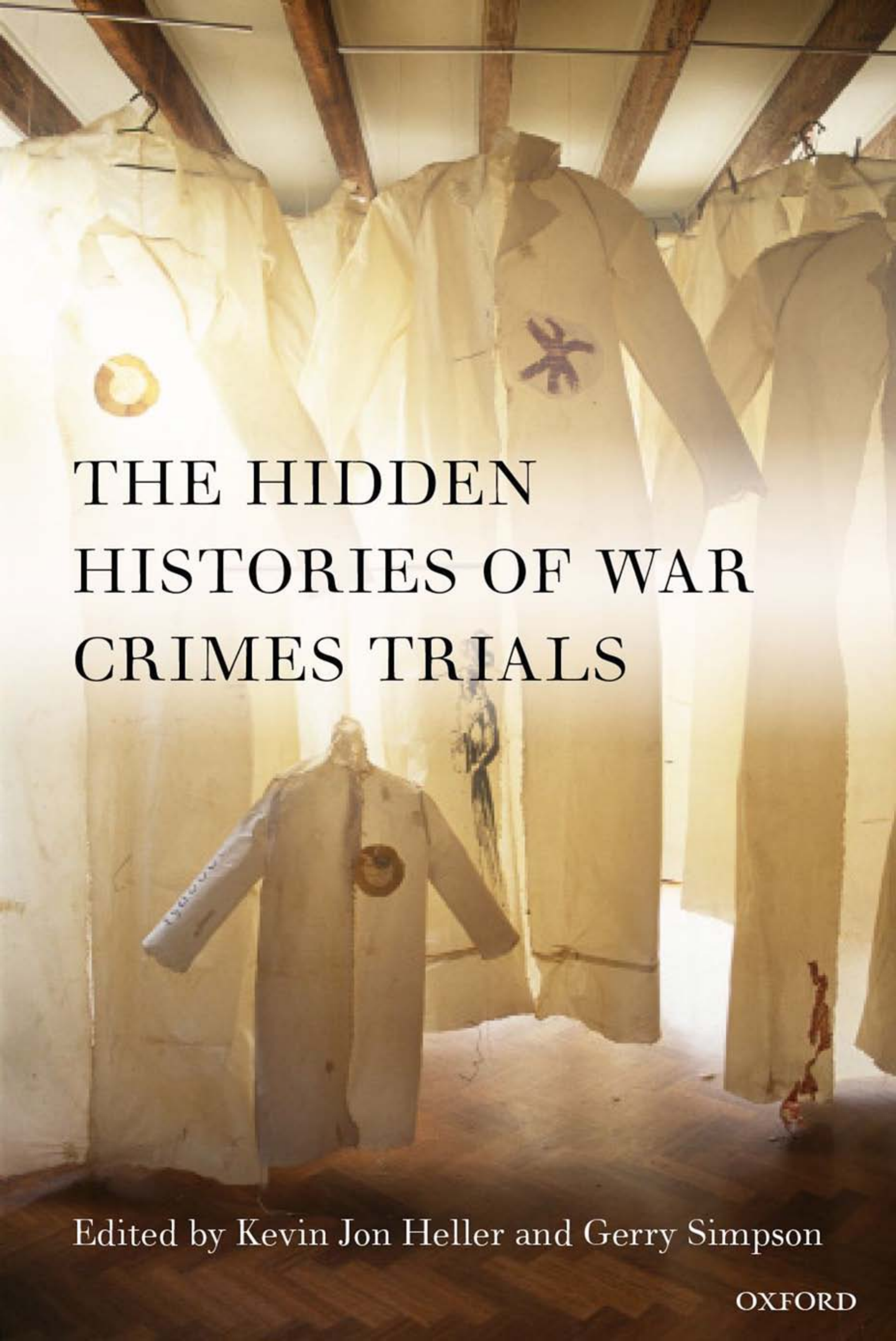


THE HIDDEN HISTORIES OF WAR CRIMES TRIALS

Edited by Kevin Jon Heller and Gerry Simpson

OXFORD

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KEVIN JON HELLER

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GERRY SIMPSON

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for Deborah Cass (1960–2013)
and
for Bianca, Gretchen, Beatrice,
and Desdemona (you know who you are).

Acknowledgements

Editing a book seems so simple on paper. Phone your friends, ask them to come to a conference and deliver a paper, cajole them into writing a chapter, place the chapters in a sensible order, write an introduction and send it to the publishers. In the same way that making a film involves more than pointing a camera at some people and getting them to act out a script, so, too, a book like this relies on the talent of many, many individuals. Cathy Hutton, conference-organizer extraordinaire, tolerated our peccadilloes and glacial decision-making, and expertly administered a successful conference in October 2010. With tactful reminders, she continued to harry authors and editors after the conference. This book came into being thanks to her efforts and thanks to the skill and good humour of Monique Cormier, the Research Associate on the ARC War Crimes Project. Monique was a vital part of the untold stories team. We thank her. The copy-editing task fell first to Jessye Freeman, who also read the chapters for sense and sensibility, and then to Bianca Dillon, whose meticulousness ensured that the chapters formed an actual book, not simply a collection of disparate papers. *Hidden Histories* is a greatly improved volume thanks to their work. A number of conference presenters are not included in this volume. We acknowledge the contributions of Yuki Tanaka, Lia Kent, Suzannah Linton, Yuma Totani, Tim McCormack, Chris Jenks, Paul Bartrop, Neville Sorab, Magda Karagiannakis, Joanna Kyriakakis, Martine Hawkes, John Heard, and Hannibal Travis to the conference. Jennifer Balint was our co-conspirator in organizing the conference itself. She contributed hugely to the planning of and intellectual inspiration behind both the conference and book. Funding and support for this conference and book project was provided by the ARC and by the Asia-Pacific Centre for Military Law. We are delighted to be publishing this book with our friends at Oxford University Press—in particular, our all-too-patient and responsive editors, John Louth and Merel Alstein. The coats featured in the photograph on the cover of the book formed part of *Marking the Stranger*, an exhibition by Gerry's mother-in-law, the Melbourne artist, Shirley Cass.

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History of Histories

Gerry Simpson[*]

It is one of the pleasures of organizing a conference and then editing the resulting book that an idea—and one that had appeared so capricious and odd—materializes in the hands of intelligent and alert speakers and writers. At the end of 2010, we convened a conference in Melbourne called 'Untold Stories: The Hidden Histories of War Crimes Trials'.[1] This was the first of four conferences held under the auspices of an Australian Research Council (ARC) project on the history and theory of war crimes trials (the others were, in 2011, 'Affective States' and '*Eichmann* at 50', and 'The Passions of International Law' in 2012).

The call for papers generated a surprisingly enthusiastic response from colleagues around the world. There were, it turned out, many stories to be told about war crimes trials that the discipline had either neglected or under-rehearsed. Sometimes, these were stories about familiar but under-explored and misunderstood landmarks in the conventional history of international criminal law. (For example, we had an instinct that there was more to Peter von Hagenbach than the pantomime cliché, but Greg Gordon has actually done the work, and enlivened the circumstances and legal culture around this iconic moment in the field.) Sometimes a trial, unknown even to the international criminal law cognoscenti, was positioned as a moment in the field's pre-development, eg Benjamin Brockman-Hawe's comprehensive account of the Franco-Siamese Tribunal and the trial of Kham Muon as an early example of complementarity enacted in the context of late-empire. Here, from his chapter (Chapter 3), is the French view of the original Siamese trial:

> The authors of the assassination of [Kham Muon] shall be tried by the Siamese authorities. A representative of France shall be present at the trial and witness execution of the sentence pronounced. The French Government reserves the right to appreciate whether the punishment is sufficient and, where applicable, claim a new trial before a Mixed Court, whereof it shall determine the composition.[2]

[*] Kenneth Bailey Professor of Law, Melbourne Law School.

[1] Half the title has survived into print. The other, now missing, half was borrowed from the English playwright, Alan Bennett. See Alan Bennett, *Untold Stories* (London: Faber and Faber, 2001).

[2] Von Hagenbach's trial, too, is understood as the first in which the interaction between local prerogative and international trial is played out. As Brockman-Hawe reminds us:

[The Kham Muon Trial] was only the second time that a supranational court had been accused of violating an individual's right to be tried by a court of their home country (*jus de non evocando*) [the

Sometimes, the best-known trials (notably, the post-war trials in Germany) were subject to a re-reckoning (see Rosa Ana Alija-Fernández on the Spanish Kapos trials at Mauthausen, Chapter 5; and Grietje Baars on the trial and non-trial of industrialists after the war, Chapter 8). In one instance, an incident that had twice briefly touched my consciousness became fully illuminated. About ten years ago, I was travelling through a mid-size French town called Confolens in Limousin. Ten miles outside of town there was a road sign for the village of Oradour-sur-Glane. The name seemed familiar to me. I remembered, as a student, reading a novel in which this village had been the leading character.[3] I drove into Oradour-sur-Glane. Here was a village that was now two villages: a fully visible, nondescript contemporary country exurb and a hidden place surrounded by a high fence and accessible only through a museum. The latter was the dead village of Oradour-sur-Glane preserved in its history or, one should say, a single day in its history—the day that the '3rd company of the 1st battalion of Panzergrenadier of the 4th SS-Panzer-Regiment "Der Führer" of the 2eSS-Panzer-Division "Das Reich" (Mégret)' had entered the village and massacred the inhabitants. As Frédéric Mégret reminds us, there was a trial, too. This trial, held in Bordeaux in 1953, is, in a way, a hidden history of a dead village.

In offering a history of this book and its histories we must make all the usual apologies concerning selection, amnesia, and the temptations of mistellings and re-tellings. Nevertheless, we might reflect on at least four modes of historical work being done here: *Consolation*, *Recovery*, *Pedigree* and *Pedagogy*. In this collection, there are terrific examples of each of these four, but some chapters have been exercises in more than one of these modes while others have exploded the categories altogether.

(I) Consolation

Trial narratives console us just as newly exposed histories of the past can provide comfort.[4] Some of the chapters here have rotated around the idea either that an obscure trial has provided a measure of consolation to the bereaved or the injured (Faedi Duramy, Chapter 10; Tiba, Chapter 15), or that a trial that might have done this has failed to do so (Balint, Chapter 4), or that a trial or series of trials that has consoled the victims has, at the same time, created a new cast of victims by misapplying legal procedure to the detriment of the accused (Fitzpatrick, Chapter 16).

One sort of untold story, then, is derived from a form of identity politics or scholarship. Writing and practice in this genre might concern Japanese slave labour

first being the trial of von Hagenbach before a twenty-eight judge panel at Breisach over four hundred years before].

[3] David Hughes, *The Pork Butcher* (London: Constable and Constable, 1984).

[4] See Christine Schwobel on the idea of comfort in Gerry Simpson (ed), *The Passions of International Law* (forthcoming, 2014).

or the rape of 'comfort women'.[5] Telling these stories either in trial or in scholarship is sometimes derived from a wish to re-inscribe Narrelle Morris's 'numerous and unknown victims' or ensure that they do not become what Lia Kent, in her paper at the original conference, called, 'wandering ghosts'.[6] Sometimes, this can be a demand for recognition, as in Jennifer Balint's plea for an acknowledgement on the part of the Turkish state that the Armenian genocide took place and was not simply a series of deportations initiated because of 'wartime necessity'. And it is Balint who makes the important point here that law will not always offer consolation. Indeed, law itself was complicit in these crimes, making them 'allowable', as she puts it.

In Benedetta Faedi Duramy's chapter (Chapter 10) on German massacres in post-Mussolini Italy, she seeks to tell the untold story of a number of survivors (and, by implication, those that did not survive). In such instances legal proceedings (and here these include both the trials of those responsible and the civil proceedings brought in 2008 by the German state against Italy) occasion a narrative in which survivors speak directly. The proceedings themselves may be less important in this regard. No doubt the trial of Joseph Milde (the proximate untold story) and, to a greater extent the *Germany v Italy* proceedings at the International Court of Justice, were significant *as* legal events. But, for Faedi Duramy, their importance lies in the way in which such events provide a catalyst for story-telling and, perhaps more importantly, offer an audience for such stories. People *listen* to trial testimony and extracurial narratives around trials.

The demands of consolation, of course, might become something akin to a claim for compensation. We might think here of the class actions brought in California by the victims of slave labour, or civil society agitations on behalf of Korean women exploited by the Japanese Imperial Army. Yuki Tanaka's graphic account of the killing of Nauran Lepers or Firew Kebede Tiba's compelling chapter (Chapter 15) on the history of the Derg and its Red Terror in Ethiopia belong in this category. As Tiba argues, '[t]he full scale of atrocities committed in Ethiopia following the overthrow of the imperial regime in 1974 is yet to be fully told'.

Perhaps, though, there can never be a fully compensatory or truly consoling re-telling.

(II) Recovery

There is, of course, also a scholarly imperative to *recover* lost histories. Why should the field keep repeating the same narrative arc from 'Tokyoberg' to The Hague? Bringing in from the margins under-told trial histories helps to de-Europeanize

[5] See Yuki Tanaka, 'Japanese Atrocities on Nauru Island During the Pacific War' (unpublished paper, on file with editors) and essays by Nicola Henry and Tina Dolgopol on comfort women in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited*, (Leiden: Martinus Nijhoff, 2011).

[6] See Lia Kent, 'Special Panels in East Timor: Official Goals and Local Expectations', (unpublished paper, on file with editors). See, too, Hannibal Travis's treatment of the Biafran massacre and the Bengal killings in his fine-grained historical study, 'Cold War Genocides: Failures of Global Justice in Nigeria and Pakistan' (unpublished paper, on file with editors).

the history of war crimes trials by showing that trials were also occurring in 'other places'. These can be national stories. Georgina Fitzpatrick and Narrelle Morris (Chapters 16 and 17) tell the story of Australia's involvement in a series of hidden trials in the Asia-Pacific region. As Morris powerfully demonstrates, Asian victims—largely absent from the major trial in Tokyo—were much more visible in the 300-odd trials undertaken by the Australians in the Asia-Pacific region. That is not to say that 'Asianness' was not constructed in a certain way in those trials or that visibility was not also a fresh form of invisibility. Nonetheless, these are important trials, and the project (led by our colleague, Tim McCormack) to publish trial reports arising out of this period is to be greatly welcomed.

Sometimes the conference and book have sought to decentre the major trials in general. Yuma Totani in her (unpublished) conference paper described the trials in Tokyo that followed the International Military Tribunal for the Far East, while Alija-Fernández brings to the light the experience of Spanish inmates in the camps and the way in which they moved back and forth themselves between nationality and statelessness. Finally, we have Roger Clark's and Mark Drumbl's chapters (Chapters 19 and 20), in which *Greiser* and *Sakai* are announced as major pre-Nuremberg, pre-Tokyo, national landmarks in the history of international criminal law.

National histories, of course, are often deliberately obscured by a diffident state. The Australians and Spanish might be keen to see the recovery of their lost histories of prosecution and trial, but what of the French? The trials of Laval and Pétain are hardly celebrated moments in French contemporary history, after all. And for good reason, according to Dov Jacobs, in his Chapter 6. The Turkish authorities, too, have been reluctant to advertise the trials they convened after the mass killings of Armenians. Paradoxically, here is a state that did deliver—through a series of trials held after the Great War—what Jackson Maogoto (Chapter 14) claims is a 'measure of justice' for the victims but now would prefer to see that effort left in the archive.

Steve Vladeck's forensic chapter (Chapter 9) also seeks to recover a hidden history, but one that is embedded in a larger much more visible history. During the US Supreme Court's struggle over (and sometimes with) the Bush administration's detention of individuals on Guantanamo Bay, a great deal turned on the extent to which foreign nationals were able to claim constitutional or statutory rights in US federal courts. The 1950 case of *Eisentrager* was at the centre of this debate. Yet, as Vladeck notes, the decision was widely misread, and treated as a precedent for the view that aliens are not entitled to enjoy Fifth Amendment rights outside the sovereign territory of the United States. Vladeck's re-reading of the case and his return to the military commission hearing that provoked the Supreme Court's review is an exercise in carefully calibrated recovery.

The lost history recovered by Grietje Baars (Chapter 8) is that of international criminal law as a retributive structure to be imposed on economic actors guilty of encouraging, provoking or facilitating war or mass criminality. The 'economic case', as she calls it, has been largely hidden in subsequent accounts of the post-Nuremberg trials and was comprehensively elided in the West by the time the Cold War was in

train (though it remained potent in the East as a way of explaining culpability for Nazism). Indeed, the relationship between political economy and mass atrocity has remained obscure in international criminal law since that time. Baars captures this when she says: 'As such, to paraphrase Miéville, the de facto immunity of business leaders, a necessary ingredient of economic imperialism, *is* ICL.'

War and atrocity can be attributed to many causes (race, religion, ethnicity), but 'the "economic" has been removed from the narrative of war'. This is what Baars calls, in an expressive epigram, 'capitalism's victor's justice'.

(III) Pedigree

Tom Franck, who died in 2009, employed the idea of "pedigree" to great effect in his *The Power of Legitimacy Among Nations*, and in international criminal law, there is an increasing tendency to identify a lineage or pedigree for what often looks like a departure from existing norms.[7] Perhaps as a field matures the turn to history becomes more attractive. The general idea appears to be: 'the present seems worked through, it's time to do some archaeology' (to use a loaded term) or 'the system is built, let's find out how it happened'. Pedigree also is partly about establishing that a new field has not simply engaged in bootstrapping (or 'making it up as we go along', as someone said at the conference). These histories suggest that instead someone in the past made it up.

Untold Stories took place a few months after the meeting of the International Criminal Court's Assembly of States Parties in Kampala. One of the more significant outcomes of that meeting was an agreed definition of a crime of aggression. Of course, this crime was desperately short of pedigree when the Nazi and Japanese elites were placed on trial at Nuremberg and Tokyo. Kellogg-Briand and a passing reference in the Versailles Peace Treaty hardly constituted firm precedents. The position improved very little *after* 1949. In *R v Jones*, the House of Lords and, at an earlier stage, the Court of Appeal struggled to find post-war evidence of a robustly prosecuted crime of aggression.[8] Had there been any prosecutions apart from those in the zonal trials? Roger Clark, (Chapter 19) with brisk authority, disinters the 'suggestive' trial of Takashi Sakai by a Chinese national court in 1946 and makes the tentative claim that Sakai was the first Japanese to be tried and executed for the crime of aggression. This would make him only the second person in history to be prosecuted for the crime of aggression. The first may well have been Arthur Greiser. His trial before the Supreme National Tribunal of Poland ended with him being sentenced to death on 9 July 1946 and then executed 'in the early hours of the morning of July 21, 1946'. Mark Drumbl's familiar combination of doctrinal sure-footedness and sensitivity to context (Chapter 20) illuminates this trial

[7] Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990).

[8] *R v Jones and Milling* [2006] UKHL 16.

and establishes this mostly untold story as a genuine precursor to Nuremberg and Kampala.

The pedigree of international criminal law norms or procedures is often established through an account of a local history. Certainly, this book is greatly concerned with the recovery of those lost histories of the local that offer pedigree in a different idiom. Julia Selman-Ayetey's chapter (Chapter 13) on Norway's universal jurisdiction laws and the case of Mirsad Repak does precisely this. Norway, it turns out, enacted a law of universal jurisdiction as far back as 1902. It is a modified version of this law that permitted Norwegian courts to assert jurisdiction over Mr Repak, a member of the Croatian Defence Forces ('HOS'), during the Bosnian wars. Mr Repak was sentenced to eight years in prison and was ordered to pay damages to some of his victims. Here, as in many other instances documented in the book, a domestic court was obliged to engage in an analysis of the nature of a particular armed conflict and the applicability of international norms in local settings. One theme that emerges, then, again and again (eg Tallgren) is the way in which international criminal justice is always hybridized or modified in its encounters with local jurisdiction before sometimes returning again to the cosmopolitan space (see Liivoja's discussion of the European Court of Human Rights cases arising out of the Baltic trials, Chapter 12). And here, too, there is a sense (discernible, as well, in the chapters by Maogoto and Tiba) that the future of international criminal law—like many of its recovered pasts—may lie not in the grand gesture of the international trial but in the modest strivings of local jurisdiction.[9]

(IV) Pedagogy

A final style that emerged in the volume was built around *pedagogy* and the problems of historiography. Laurence Douglas's phrase 'didactic legalism' floated around at the conference, as did the belief that lessons might be learnt or unlearnt from our untold trials. The past is a foreign country, they do things the same way there. At least sometimes. Peter von Hagenbach's trial was grisly in some respects, but in others, as Greg Gordon points out (Chapter 2), it compared favourably with the Military Commissions Acts in the US or the detention of Prisoner X. Georgina Fitzpatrick cautioned us not to simply condemn historical actors, and indeed there was very little of that in the presentations. In the end, there was genuine curiosity about how they, in that foreign country, had thought about collective guilt, about joint criminal enterprise, about complementarity and so on.

[9] This combination of local and international justice takes us back to piracy of which Neville Sorab, at the conference, spoke when discussing some recent piracy trials (on file with the editors). But it is in war crimes trials in general that piracy is often invoked as a precedent for what would otherwise appear unprecedented (for example, the assertion of unusual forms of extra-territorial jurisdiction)—thus the description of Eichmann, at this trial, as a 'latter-day pirate'. Early piracy trials provide, in other words, the field's missing pedigree.

This book does not tell the story of unenlightened lawyers working in the darkness of history waiting to be redeemed in some great late-twentieth century leap forward. Instead, we read about acts of imagination and innovation going back to the nineteenth century, and we read about mistakes that we are familiar with from the contemporary scene.

In Fred Mégret's chapter (Chapter 7) we see lawyers themselves engage in pedagogic efforts. As he puts it:

> As in previous and subsequent war crimes trials, both defendants and victim witnesses were tempted to make grand declarations about what they saw as the issues at stake rather than simply answer the judges' factual questions.

Dov Jacobs' chapter (Chapter 6)—also about the French reckoning with the past but this time involving the trials of Pétain and Laval—confronts head on the problem of history and truth-telling through trial. It is clear that the French state wanted a particular version of history to emerge from these trials: one that blamed a treacherous and superannuated elite for the collaboration and, at the same time, exonerated France. These narratives, then, 'shape' history, but the telling of hidden histories is also a way of reshaping that same history. Jacobs puts the point forcefully (whether one accepts his distinction between 'reasoned analysis' and 'illusory truth'):

> Only a reasoned analysis of the importance of post-conflict narratives, with their ambiguities, rather than an over-reliance on an illusory objective truth, can help academics and practitioners advance in the direction of the desired reconciliation.

Rain Liivoja's chapter (Chapter 12) also negotiates a tension in the didactic trial, between what he calls 'the historical record produced by such trials [and] existing historical paradigms'. In the case of the Soviet trials held in the Baltic Republics, the trial record is deeply unreliable. Here we have what Liivoja calls a 'conscious falsification of evidence' (as he notes, the notorious Soviet Prosecutor Andrey Vyshinsky, who turns up at Nuremberg as well, had engaged in doctoring the medical reports produced by the Extraordinary State Commission established as early as 1942 to investigate alleged Nazi atrocities in the Baltic states). But even in the case of the investigations undertaken into Soviet offences, the tension between histories is palpable. In particular, there is the sharp divergence between the still-persistent Russian 'myth of war' and the judicial correction of that myth. Sometimes this tension becomes explicit:

> The trials and tribulations of Mr Kononov had probably something to do with the fact that on 15 May 2009, Mr Dmitry Medvedev, President of the Russian Federation, established a Commission to Counter Attempts to Falsify History to the Detriment of Russia's Interests. Reportedly, legislation is being prepared that would make it a criminal offence to diverge from the official line of history as determined by the commission. On 30 September 2009, the Parliament of Lithuania fired back by amending the Criminal Code, criminalising the denial or justification of crimes against humanity committed by the Soviet Union or Nazi Germany. The battle of histories continues.

Tamás Hoffmann, traversing similar territory, wonders if international criminal law is really capable of coming to terms with something we might think of as 'the

past'. In his chapter (Chapter 11), he explores the use and misuse of international criminal law's categorizations and tropes in the context of Hungary's investigation and prosecution of those responsible for communist repression in the period immediately following the 1956 uprising. This is another story of a local court either getting the (international) law wrong somehow or creating a distinctively local rendering of that law (a great deal in the field turns on the difference between these two positions). But it is also a story about the limits of international justice in recounting a certain kind of past. Not every hidden history has to have a moral, but as Hoffman puts it:

> If there is any moral in the story—apart from the necessity of reforming the education of judges—it is that international criminal law cannot in itself substitute for the ultimately political project of confronting past wrongs and trying to achieve national reconciliation.

This sort of reckoning is elusive. Perhaps it is not even desirable. In his chapter (Chapter 18), our colleague at Melbourne Law School, Peter Rush, pivots around the film *El secreto de sus ojos* in a series of gestures at the ineffability of pain and suffering, and the genres of representation that seek to work round that ineffability and establish what he calls a 'memorial jurisdiction' in relation to Argentina's Dirty War between 1976 and 1983. This war—a war of terror conducted in official and clandestine keys—has been the subject of a highly visible campaign of national reckoning. It has bequeathed a name—the disappeared (or *desaparecidos*)—and a politics of memory. Law, of course, a 'producer of truth' and memory, is (sometimes) central to all of this. Indeed, it is a hidden history of Rush's chapter that the trial processes have intensified in recent years. Yet Rush is as uneasy as Hoffmann at the idea that law could provide a definitive accounting or any sort of stable representation of atrocity or trauma. In a life lived with law, there is always 'slippage and complexity' (Rush).

What might 'we' do in the face of all of this? On one hand, the Finnish War Responsibility cases are early examples of trials in which the crime of aggression is given a local re-interpretation. In this sense, Immi Tallgren's chapter (Chapter 21) belongs in the tradition of, say, Roger Clark's recovery of the *Sakai* Trial. Tallgren's chapter though—inquisitorial, forthright *and* tentative—is also about the (im)possibility of a law that writes history. In this case, law is recruited to comprehend and read the relations between Finland, Nazi Germany and the Soviet Union during the 1940s. But that law, too, had to negotiate Allied demands that the Finnish leadership during the war with the Soviet Union (the Continuation War) be held to account, as well as outrage within Finland that wartime leaders 'who had tried their best for the nation' (Soini, quoted by Tallgren) should be prosecuted at all. The trial proceeded and some important Finnish leaders were convicted and jailed. The questions then arise: can this juristic history be re-written or unwritten by law? Should they be? By whom? Told stories can certainly be retold. But in the act of re-telling, it seems, many other stories emerge from new contexts at different times.

In the end, this book features a series of untold or under-told stories about trials and histories that have, in some respect or other, been hidden or obscured by the

imperatives of an official or semi-official disciplinary history. Yet, while acknowledging the expressive value of trial, the scholarly value of recovery, the human value of consolation and the doctrinal value of pedigree, the contributors have, at the same time, kept their eyes fixed on the problem of history itself and the boundaries of the knowable.

PART 1

PRE-HISTORIES: FROM VON HAGENBACH TO THE ARMENIAN GENOCIDE

2

The Trial of Peter von Hagenbach: Reconciling History, Historiography and International Criminal Law

Gregory S. Gordon[*]

(I) Introduction

It is an article of faith among transnational penal law experts that Sir Peter von Hagenbach's 1474 prosecution in Breisach for atrocities committed serving the Duke of Burgundy constitutes the first international war crimes trial in history. Hagenbach was tried before an ad hoc tribunal of twenty-eight judges from various regional city-states for misdeeds, including murder and rape, he allegedly perpetrated as governor of the Duke's Alsatian territories from 1469 to 1474. Though it remains obscure in the popular imagination, most legal scholars perceive the trial as a landmark event. Some value it for formulating an embryonic version of crimes against humanity. Others praise it for ostensibly charging rape as a war crime. And all are in agreement that it is the first recorded case in history to reject the defence of superior orders. Such a perspective has arguably helped invest the Nuremberg trials with greater historical legitimacy and lent subtle sanction to the development of international criminal law in the post-Cold War world. But the legal literature typically deals with the trial in very cursory fashion and its stature as pre-Nuremberg precedent may hinge on faulty assumptions. As the 1990s explosion of ad hoc tribunal activity is nearing its end and the legal academy is taking stock of its accomplishments and

* Associate Professor, University of North Dakota (UND) School of Law and Director, UND Centre for Human Rights and Genocide Studies. This piece would not have been possible without the wisdom, insight and language skills of Dr Robert G. Waite, a talented and generous German historian. The author is also quite grateful for the exceptional research assistance of Jan Stone, Head of Faculty Services at the UND School of Law Thormodsgard Library. I am grateful as well to Dr Scott Farrington whose excellent Latin translations were essential. Thanks for invaluable editorial help are also due to Professor Laurie Blank, Director of the Emory Law School Humanitarian Clinic. Special thanks as well go to research assistants Moussa Nombre and Lilie Schoenack and to UND law student Vanessa Anderson, whose German translation assistance was very much appreciated. My dear friend Dominique Latteur also provided invaluable historical insights. And thanks, as always, to my wonderful wife and children.

failures, it is perhaps time to look more closely at the Hagenbach trial. This piece will do that by digging below the surface and revisiting some of the historical and legal premises underlying the trial's perception by legal academics.

In the main, international law specialists have relied on older historical accounts to conclude that Hagenbach's service as Burgundy's Alsatian bailiff constituted a five-year reign of terror that culminated in a legitimate and ground-breaking atrocity conviction.[1] But revisionist historians tend to see Hagenbach's ordeal not as a good-faith justice enterprise but rather as a show trial meant to rebuff the territorial ambitions of Sir Peter's master, Charles the Bold.[2] They emphasize that liability was grounded on confessions obtained through torture.[3] And while they concede that Hagenbach may have been boorish and autocratic, they note that the first few years of his rule were relatively pacific and the 1474 uprising against Sir Peter was primarily a reaction to attempted Burgundian regional encroachments and perceived feudal suppression of growing urban and bourgeois prerogatives.[4] The trial itself, they point out, was not international at all as the men who sat in judgment of Hagenbach were all subjects of the Holy Roman Empire.[5] Nor was it a war crimes trial, since there was no armed conflict at the time the alleged atrocities took place.[6]

But there are shortcomings in the revisionist analysis as well. The high level of animosity shown to Hagenbach, as demonstrated by the severity of the torture and the stripping of his knighthood, as well as a criminal past, indicate that the atrocity allegations may not be unfounded. Moreover, there is evidence that, in the period leading up to the trial, Burgundy's occupation of the territory was hostile and so the charges against Hagenbach may very well be considered war crimes. Finally, by 1474, the Holy Roman Empire was no longer a viable political entity and so the ad hoc tribunal may indeed have been international in nature.

This chapter is divided into four sections. Part II examines the conventional view of Hagenbach in the field of international criminal law (ICL). It demonstrates that the ICL perception of the case as history's first 'international war crimes trial' finds its origins in a law professor's *Manchester Guardian* op-ed published while the International Military Tribunal (IMT) at Nuremberg was deciding the fate of the major Nazi war criminals. The op-ed, by English jurist Georg Schwarzenberger, argued that the Hagenbach precedent supported many of the legal positions taken by the IMT prosecution at Nuremberg, including charging crimes against humanity

[1] See, for example, Georg Schwarzenberger, 'A Forerunner of Nuremberg: The Breisach War Crime Trial of 1474', *The Manchester Guardian* (London), 28 September 1946, 4; L.C. Green, *Superior Orders in National and International Law* (Leiden: Sijthoff, 1976), 263; Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge: Cambridge University Press, 2005).

[2] See, eg, Richard Vaughan, *Charles the Bold: The Last Valois Duke of Burgundy* (Suffolk: The Boydell Press, 2002), 283–86.

[3] Vaughan, above n 2. [4] Vaughan, above n 2, 266–85.

[5] Hermann Heimpel, 'Mitelalter und Nürnberger Prozeß' in *Festschrift Edmund E. Stengel: zum 70. Geburtstag am 24. Dezember 1949 dargebracht von Freunden Fachgenossen und Schülern* (Münster [u.a.]: Böhlau, 1952), 449.

[6] Hermann Heimpel, above n 5.

and rejecting the defence of superior orders. And, following in Schwarzenberger's footsteps, subsequent ICL scholars have cited the Hagenbach case in support of arguments for normative evolution in the field, such as contending that Hagenbach represents precedent for charging rape as a war crime. Part III considers the case's historiography, limning the evolution of a narrative that starts with Hagenbach as evil incarnate and progresses toward a more charitable view that explains the historical animosity toward him in terms of Hagenbach's being a francophone outsider imposing a reform regime on an entrenched, corrupt, germanophone society. Given the historiographical cleavage, then, each camp has an historical narrative that necessarily diverges from the other. But they also have many points in common. This part considers the convergences and divergences as well. Finally, Part IV attempts to reconcile the divergences and concludes that both historic portrayals of Hagenbach are likely accurate: he was a despised outsider and reformer at first, but became violent and despotic toward the end of his stewardship when resources to govern were dwindling and local unrest reached a tipping point. Hagenbach likely committed atrocities in this final phase. At the same time, and for related reasons, Burgundy became a belligerent occupying power. And given the atrophied state of the Holy Roman Empire, those who sat in judgment of Hagenbach represented sovereign polities. So the trial of Peter von Hagenbach was indeed the world's first international war crimes trial.

It is no coincidence that such a unique event took place between the erosion of medieval hegemony and the imminent establishment of Westphalian sovereignty. Not until the Westphalian veil was pierced by the Nuremberg trials nearly 500 years later, did the subject of the Hagenbach trial take on contemporary relevance in the legal literature. In the end, the piece concludes that while some of its details may be lost in the mists of time and its legal status may remain muddled in theoretic gray zones, the Hagenbach trial should continue to play an important role as an historic and conceptual pillar of international criminal law's 'pre-history'.

(II) Hagenbach and International Criminal Law

International criminal law is a product of the twentieth century. After World War I, through the treaties of Versailles and Sèvres, Allied leaders contemplated using it to bring to justice Kaiser Wilhelm II and the Ottoman officials responsible for the Armenian genocide. But the requisite political will to follow through proved lacking and the formulation and use of ICL would have to wait for the prosecution of the architects of another world war's horrors. The IMT was, then, a novel enterprise and thought to be without precedent. As such, at the time of its establishment, it was subjected to much criticism. Among other things, detractors accused it of enforcing laws *ex post facto* and creating out of whole cloth a new offence—crimes against humanity.

But at least one expert had a very unique view of the Nuremberg proceedings. Georg Schwarzenberger, an English jurist of Jewish–German descent who had

fled Nazi persecution in the 1930s, saw an analogy between Nuremberg and an obscure case from the fifteenth century—the criminal trial at Breisach of Sir Peter von Hagenbach. In an article written after the close of evidence at the IMT trial, while the judges were still deliberating, Schwarzenberger published an article in The *Manchester Guardian* titled 'A Forerunner of Nuremberg: The Breisach War Crime Trial of 1474'.[7] In the article, Schwarzenberger opined that the Hagenbach proceeding 'appears to be the first international war crime trial' and that it was conducted 'in accordance with the highest judicial standards'.[8]

Schwarzenberger explained that, in serving as a governor for the Duke of Burgundy, Hagenbach 'established a regime of arbitrariness and terror that went beyond anything that was customary even in those rather rough times' and he went so far as to analogize Hagenbach's conduct with that of the Nazi leaders in the dock at Nuremberg.[9] In referring to the trial itself, Schwarzenberger suggested that Hagenbach was charged with something akin to crimes against humanity. In the words of the prosecutor, he noted, the accused had 'trampled under foot the laws of God and men' and had committed what would be called today crimes against humanity.[10]

Moreover, Schwarzenberger stated that Hagenbach's trial involved charges of war crimes because 'the hold of Burgundy over the pledged Austrian territories was more akin to the occupation of foreign territory in war-time than to a peacetime occupation of foreign territory under treaty'.[11] Similarly, by Schwarzenberger's estimation, the trial was 'international' in character since the judges hailed from different sovereign city-states in the region that were no longer part of the Holy Roman Empire.[12]

Finally, the article closed by noting that 'when judgment was pronounced, the tribunal rejected the advocate's preliminary objections to its jurisdiction. It overruled the plea of superior orders, found Hagenbach guilty, and condemned him to death'.[13]

Apparently, the prosecutors at Nuremberg noticed Schwarzenberger's article. In the Control Council Law No. 10 'subsequent proceedings', American Chief Prosecutor Telford Taylor relied on the Hagenbach case to argue to the Nuremberg Military Tribunal in The *Ministries Case*, for example, that charging crimes against humanity did not constitute an impermissible *ex post facto* application of law.[14] The Hagenbach trial factored into *The High Command Case* as well. In noting that the provisions of the IMT Charter and Control Council Law No. 10 were the expression of existing international law, the NMT in *The High Command Case* judgment referred to 'the trial of Sir Peter of Hagenbach held at Breisach in 1474. The charges against him were analogous to "Crimes against Humanity" in modern concept. He was convicted'.[15]

[7] Schwarzenberger, above n 1, 4.
[8] Schwarzenberger, above n 1, 4.
[9] Schwarzenberger, above n 1, 4.
[10] Schwarzenberger, above n 1, 4.
[11] Schwarzenberger, above n 1, 4.
[12] Schwarzenberger, above n 1, 4.
[13] Schwarzenberger, above n 1, 4.
[14] See *US v Ernst von Weizsaecker (Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10*) (International Military Tribunal, Ministries case No 11/Vol 13, October 1946–May 1949) 96–7. See also *US v Von Leeb (The High Command Case* No 12/Vol 11, October 1946–May 1949), 476.
[15] *US v Von Leeb (The High Command Case* No 12/Vol 11, October 1946–May 1949), 476.

And so this became the Rosetta Stone for ICL perception of the Hagenbach case—forged by Schwarzenberger and embraced at Nuremberg. Schwarzenberger strengthened its foundation with subsequent scholarly publications. For example, he devoted a short chapter to it in his treatise *The Law of Armed Conflict* (1968).[16] Chapter 39 ('The Breisach Trial of 1474') of Volume Two, titled *International Law as Applied by International Courts and Tribunals*, fleshed out the materials of his *Manchester Guardian* article.[17]

By 1976, Professor L.C. Green of the University of Alberta could observe in his book, *Superior Orders in National and International Law*:

> There seems to be a widely accepted view that the problem of superior orders on the level of international law is of recent date, originating with the judgment of the Nuremberg tribunal after the Second World War. In fact, this is not historically correct. In September 1946, Professor Schwarzenberger drew attention to the trial conducted on the orders of the Archduke of Austria on behalf of himself and his Allies of Peter of Hagenbach, Charles of Burgundy's Governor of Breisach. The trial took place in 1474 before a court made up of 28 judges drawn from Breisach, the other allied Alsatian and Upper Rhenian towns, Berne, a member of the Swiss Confederation, and Solothurn, allied with Berne. Broadly speaking, the charges covered what today would be described as war crimes and crimes against humanity.[18]

Then, in a passage starkly demonstrating Schwarzenberger's influence in connecting the Hagenbach trial to modern ICL antecedents, Green linked Hagenbach to both Article 227 of the Versailles Treaty (contemplating an international criminal trial for Kaiser Wilhelm II) and a nascent version of crimes against humanity. 'Foretelling the charges specified in the Treaty of Versailles against the Kaiser, Hagenbach was alleged to have "trampled under foot the laws of God and man" '.[19]

Subsequent descriptions of the case in ICL literature, with minor variations, are remarkably consistent with the Schwarzenberger blueprint. Robert Cryer has noted that, with respect to the Hagenbach trial, 'the standard reference for international criminal lawyers remains Georg Schwarzenberger's *International Law as Applied by International Courts and Tribunals II: The Law of Armed Conflict*, Chapter 39'.[20] And thus Schwarzenberger's influence extends to every form of scholarship in ICL, including treatises, compilations, casebooks, law review articles, and internet commentary.[21]

In the meantime, one can discern through this entrenched narrative many of the important lineaments of modern ICL norm development. In addition to being traditionally recognized as establishing precedent for rejection of the superior

[16] Georg Schwarzenberger, *The Law of Armed Conflict* (London: Stevens and Sons, 1968), 462–6.
[17] Schwarzenberger, above n 1, 462–6.
[18] Green, above n 1, 263.
[19] Green, above n 1, 264.
[20] Cryer, above n 1.
[21] See, eg, Michael P. Scharf and William A. Schabas, 'Slobodan Milosevic on Trial: A Companion', *Continuum*, *39* (2002) ('The history of international war crimes trials begins with the 1474 prosecution of Peter von Hagenbach'); Jules Deschenes, Toward International Criminal Justice, in Roger S. Clark and Madeleine Sann (eds), *The Prosecution of International Crimes: A Critical Study of the International Tribunal for the former Yugoslavia* (New Brunswick and London: Transaction Publishers, 1996), 30; Cherif Bassiouni, 'Perspectives on International Criminal Justice', *Virginia Journal of International Law*, *50* (2010), 298.

orders defence[22] and formulation of crimes against humanity,[23] the case is now credited with helping cultivate new ICL norms. For example, it is now considered precedent for charging rape as a war crime.[24] Similarly, the tribunal's refusal to accept Hagenbach's argument that only a court of Burgundy could try him is thought to have served as a model for the International Criminal Tribunal for the former Yugoslavia's rejection of Dusko Tadic's plea of *jus de non evocando*.[25] More recently, in response to claims that the International Criminal Court's Rome Statute does not brook state self-referral of cases,[26] Mohamed El Zeidy has invoked the Hagenbach trial as proof to the contrary.[27]

This phenomenon of citing Hagenbach to help legitimize modern norm creation is summed up nicely by Timothy L.H. McCormack: 'There is a tendency by some commentators to make too much of the Hagenbach trial by characterizing it, without qualification as "the first international war crimes trial" and then relying on it as international legal precedent for more contemporary developments'.[28] Is it appropriate for modern jurists to avail themselves of the Hagenbach case in this manner? In order to answer that question, we must take a much deeper look at the historical record and legal issues.

(III) Hagenbach and History

To understand the Hagenbach phenomenon in the ICL context, one must reconstruct the historical record and then dig below its surface. Given the plethora of historical narratives regarding the Burgundian bailiff, it is necessary to classify and parse the materials—in other words, as a preliminary matter, an examination of the case's historiography is indispensable. Then the history itself can be considered to identify the narrative points of convergence and divergence.

[22] See, eg, Gary D Solis, 'Obedience to Orders: History and Abuses at Abu Graib Prison', *Journal of International Criminal Justice*, *2* (2004), 990 ('He [Henry Wirtz, Commandant of the Andersonville prisoner-of-war camp] pleaded superior orders and, like von Hagenbach nearly 400 years previously, the plea was rejected').

[23] See, eg, Evo Popoff, 'Inconsistency and Impunity in International Human Rights Law: Can the International Criminal Court Solve the Problems Raised by the Rwanda and Augusto Pinochet Cases' (Note), *George Washington International Law Review*, *33* (2001), 364 ('Aside from the Hagenbach case, efforts to create and enforce international crimes against humanity were mostly unsuccessful prior to World War II').

[24] See Thom Shanker, 'Sexual Violence' in Roy Gutman, David Rieff, and Anthony Dworkin (eds), *Crimes of War: What the Public Should Know* (New York, NY: 2nd edn, W.W. Norton, 2007), 323.

[25] Cryer, above n 1, 20.

[26] See, eg, Gregory S Gordon, 'Complementarity and Alternative Justice', *Oregon Law Review*, *88* (2009), 662 ('Self-generated referrals, on the other hand, do not inspire the same kind of confidence [and find] no support in the *Rome Statute*'s "(travaux préparatoires)"… [essentially, they] represent a government's request for ICC help in dealing with rebel groups').

[27] Mohamed M. El Zeidy, *The Principle of Complementarity in International Law: Origin, Development and Practice* (Boston, MA and Leiden: Brill, 2008), 211.

[28] Timothy L.H. McCormack, 'From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime' in Timothy L.H. McCormack and Gerry J. Simpson (eds), *The Law of War Crimes: National and International Approaches* (Alphen aan den Rijn: Kluwer, 1997), 38.

(1) Historiography

Over the centuries, history has been progressively more kind to Peter von Hagenbach. That might have seemed inconceivable in 1474. In the aftermath of his execution, he was portrayed as evil incarnate. His trial was seen as fair and his execution entirely justified. Hagenbach's initial infamy owes primarily to contemporary narratives published by his foes.[29] On the Teutonic side, Swiss chaplain Johannes Knebel, a conscientious diarist from Basel, chronicled the governorship, trial and execution of Sir Peter.[30] In the words of historian Gabrielle Claerr-Stamm, 'the Knebel diary results in a [Hagenbach] biography that is very dark, where everything is atrocities, brutality, a portrait completely black, without nuance'.[31] To a lesser extent, Johannes von Durlach, Breisach's notary, also described the Burgundian bailiff's supposed depredations in a publication known as 'The *Reimchronik*', a 1474 collection of rhymed verse.[32] Claerr-Stamm has noted that 'for centuries these first texts would influence historians who would repeat them, without any critical distance'.[33] Historian Werner Paravicini adds: 'For centuries, histories and poetic accounts cast this dark figure in the role of anti-hero for the Burgundian occupation of the Upper Rhine, the quintessential alien French speaker, the man of every excess, sexual and otherwise.'[34]

Among those historians (both expert and lay) one would include Charles the Bold's Gallic enemies (allies of French King Louis XI), who did not give terribly flattering accounts of Hagenbach in those early years.[35] For example, Philippe de Commines, former counsellor to the Duke of Burgundy, until he switched his allegiance by becoming a key advisor to Louis XI,[36] contributed towards creating the 'black legend' surrounding Hagenbach.[37] Subsequent French historians wrote even more damning prose about the Alsatian bailiff. In his *History of France*, Henri Martin wrote that Hagenbach's pastimes were murder and rape.[38] P.E. Tueffert

[29] Gabrielle Claerr-Stamm, *Pierre de Hagenbach: Le Destin Tragique d'un Chevalier Sundgauvien au Service de Charles le Téméraire* (Riedisheim: Société d'Histoire du Sundgau 2004), 11.

[30] Claerr-Stamm, above n 29, 11.

[31] Claerr-Stamm, above n 29, 11 (author's translation).

[32] Werner Paravicini, 'Hagenbach's Hochzeit: Ritterlichhöfische Kultur zwischen Burgund und dem Reich im 15. Jahrhundert 41' in Konrad Krimm and Rainer Brüning, *Zwischen Habsburg und Burgund. Der Oberrhein als europäische Landschaft im 15. Jahrhunderts* (Ostfildern: Thorbecke, 2003). Paravicini points out that the *Reimchronik* may also have been written by Berthold Stehelin, the mayor of Breisach.

[33] Claerr-Stamm, above n 29, 11.

[34] Werner Paravicini, 'Parler d'amour au XVe siècle: Pierre de Hagenbach et la dame de Remiremont', *Comptes-rendus des séances de l'année, 147* (3) (2003), 1277, 1278. Paravicini has devoted much time to reversing this perception of Hagenbach, including publication of a book containing a series of love letters exchanged between Hagenbach and an anonymous paramour. See Werner Paravicini, 'Un Amour Malheureux du XVe Siècle: Pierre de Hagenbach et La Dame de Remiremont', *Journal des savants* (2006) 105–81.

[35] Claer-Stamm, above n 29, 11–12.

[36] See Andrew Richard Scoble, 'Life of Philip de Commines' in *The Memoirs of Philip de Commines: Lord of Argenton: Containing the Histories of Louis XI. and Charles VIII., Kings of France, and of Charles the Bold, Duke of Burgundy* (London: Henry G. Bohn, 1856), vol 1, xi–xx.

[37] Scoble, above n 36, 8.

[38] Henri Martin, *The History of France from the Earliest Period Until 1789* (Furne et Compagnie, Librairies-Éditeurs, 1841).

described Hagenbach as the archetypal feudal monster whose life was one long string of crime and infamy.[39] Perhaps the best known and most influential of these French historians (and, in many ways, the culmination of the work of previous ones) was Aimable-Guillaume-Prosper Brugière, baron de Barante (commonly referred to as 'Prosper de Barante') whose multi-volume work *Histoire des ducs de Bourgogne de la maison de Valois: 1364–1477* figures prominently in any bibliography of the Burgundian duchy.[40] Barante, who apparently relied in large part on the now-missing text of Hagenbach contemporary M. Golbéry (in a journal kept by sixteenth-century architect Daniel Specklin), provided the classic portrait of Hagenbach as demonic villain.[41]

Nevertheless, a more nuanced view of Hagenbach began to emerge in the latter half of the nineteenth century. In his study of the final years of the Burgundian court, *History of Charles the Bold, Duke of Burgundy* (1868), American historian John Foster Kirk questioned the reliability of the contemporaneous germanophone accounts of Hagenbach.[42] French historians eventually followed suit. In his book *Peter von Hagenbach and the Burgundian Domination*, author Charles Nerlinger offered this charitable description of Hagenbach: 'He was a forward-looking character, but impressionable, guided only by instinct, brooking no dissent and prone to fly off the handle.'[43] That trend continued into the twentieth century. In her 1957 Hagenbach biography, *Der Landvogt Peter von Hagenbach*, German historian Hildburg Brauer-Gramm attributed tyrannical qualities to Hagenbach but found them somewhat mitigated by his capabilities as a soldier and partly excusable given the boorish culture of the Burgundian court.[44]

Hagenbach's reputation was further rehabilitated by English historian Richard Vaughan in his 1972 study *Charles the Bold: The Last Valois Duke of Burgundy*.[45] Vaughan portrayed Hagenbach as a visionary administrative reformer who was not given sufficient resources to effect necessary change in the region. Finally, Hagenbach's reputation was more recently rehabilitated in Gabrielle Claerr-Stamm's full-length biography of Hagenbach. As Paravicini notes: 'Nerlinger, Witte, Bernoulli, and very recently Gabrielle Claerr-Stamm have written Hagenbach biographies which tend to rehabilitate his image: Georges Bischoff goes as far as to call him "Peter the Good, or the Bold".'[46]

[39] P.E. Tueffert, *Pierre de Hagenbach* (Strasbourg: Revue d'Alsace 1878), 210.

[40] Amable-Guillaume-Prosper Brugière de Barante, *Histoire des ducs de Bourgogne de la maison de Valois: 1364–1477* (Paris: Librairie Le Normant, 1854).

[41] Georges Bischoff, 'Noblesse, Pouvoirs, Société: Les Pays Antérieurs de l'Autriche (Milieu XIVe Siècle—Milieu XVIe Siècle)', Doctoral Dissertation (University of Paris, 1996), 34. See also Joseph Billioud, *Les États de Bourgogne aux XIVe et XVe siècles* (Dijon: Académie des sciences, arts et belles-lettres 1922), 151 (stating that Barante relied on the Alsatian history of Daniel Specklin (1536–1589) whose manuscript disappeared in 1870).

[42] John Foster Kirk, *History of Charles the Bold, Duke of Burgundy* (Philadelphia, PA: J.P. Lippincott, 1864).

[43] Charles Nerlinger, *Pierre de Hagenbach et La Domination Bourguignonne* (Persée, 1890), 156.

[44] Hildburg Brauer-Gramm, *Der Landvogt Peter von Hagenbach* (Northeim and Zurich: Musterschmidt Verlag, 1957), 48.

[45] Vaughan, above n 2, 84.

[46] Paravicini, 'Parler d'amour au XVe siècle', above n 34, 1278.

So which historians have it right—those relying on the contemporaneous accounts or the revisionists? Are there any degrees of consensus between them? The section that follows will attempt to stitch together an historical record from the various strands of available narratives.

(2) History

(a) Points of consensus in the record

(i) Overview: The Duchy of Burgundy in a time of upheaval and transformation
The pre-Westphalian political Europe in and around the time of Peter von Hagenbach bears little resemblance to today's continent. While the nation-state represents the predominant contemporary European unit of organization, a less homogenous political configuration predominated in the fifteenth and early sixteenth centuries. Alongside the larger kingdoms and imperial realms, the landscape was dotted with lordships, principalities, cantons, grand duchies, prince-bishoprics, federations, abbeys, petty lordships, countships, fiefdoms, margraviates, and city-states. The proliferation of these smaller polities was in part responsible for a rather volatile transnational environment with strategic manoeuvring and jostling for position and power throughout the continent—sometimes directly in competition with larger kingdoms, nascent nation-states and the continent's supranational behemoth, the Holy Roman Empire. Against this backdrop played out the bloody battles of, among others, the end-stages of the Hundred Years War and the incipient clashes of what would become the Protestant Reformation and culminate in the Thirty Years War.

Some of the era's tumult was due to the emerging erosion of certain medieval power structures, such as the Holy Roman Empire and the Catholic Church. Glimmerings on the horizon of the Protestant Reformation, the resolution of dynastic struggles, and embryonic yearnings for democracy and ethno-linguistic self-determination can certainly account for much of this change. On the other hand, some of the violent upheaval of the time was very personality driven—certain ambitious rulers wished to expand their domains and were willing to engage in armed conflict to make that happen.

One such ruler in the latter half of the fifteenth century was Charles, Duke of Burgundy, whom history remembers by the colourful cognomen, 'the Bold'. His detractors referred to him as Charles 'the Terrible'. The Valois Burgundian duchy that Charles took over in 1465 had grown considerably in size, wealth and power in the century since Charles's similarly-dubbed great-grandfather, Philip the Bold, received it in apanage from King John II of France. Originally a relatively modest fief in the northeast portion of France, it became something of a middle kingdom between England, France, and the German Holy Roman Empire. It eventually stretched from the Low Countries to parts of modern-day Germany and its possessions included, among others, Franche-Comté, Flanders, Brabant, Luxembourg, Lorraine, and Alsace.

Charles the Bold, aggressively following the expansionist policies of his father, Philip the Good, was responsible for bringing the duchy's growth to its apex. Notwithstanding that growth, there were significant north-south territorial gaps in the Burgundian

realm and Charles wanted to bridge them to form a united super-landmass, the 'Kingdom of Lotharingia', under his rule in the heart of Europe. He also had hopes of parlaying such power into a bid for accession to the Holy Roman Imperial throne. As a consequence of such ambition and expansionist aims, as well as a series of shifting alliances among other sovereigns vying for power in the region, Charles found himself within the eye of a bellicose Continental storm that would eventually consume him.

More precisely, to the west, as Burgundy sought to maintain and enlarge its territory in France, Charles was engulfed in a turf war with French King Louis XI. To the east, the Duke incurred the enmity of the Swiss and Austrians after gaining control of Alsace and subjecting its citizens to the authoritarian stewardship of Hagenbach. He would ultimately be squeezed between these two axes of conflict.

At the same time, the Europe of Peter von Hagenbach was transitioning from a feudal, land-based civilization to an increasingly urbanized, bourgeois society. Much of the tension precipitating the armed conflicts was also due to this increasing rift between these old and new orders during the High Middle Ages. Peter von Hagenbach and his master Charles the Bold represented the old order. The emerging nation-state of France, whose king, Louis XI, appreciated and supported the sociological and economic shift from medieval to modern, represented the new order. So did many of the Swiss cantons and Alsatian free city-states. The rising burgher class in these pre-modern territorial pockets would lock horns with Charles and his bailiff and history would never again be the same.

(ii) The conflict with Louis XI

The contest between Charles the Bold and Louis XI began not long after Louis's ascension to the French throne. In an effort to extend and centralize royal power, Louis began to limit the prerogatives of the French nobility—assessing them new levies and stripping them of much authority. At the same time, Louis discharged some of his father's most loyal and competent ministers and officers and they, in turn, intrigued with the nobility to stir up rebellion against the French monarch.

The foremost champion of their cause was Charles the Bold, who used Louis's young and ineffectual brother Charles, the Duke of Berry, as the figurehead of a nobility opposition group, known as 'the League of the Public Weal'.[47] Led by Burgundy, the League went to war against the King of France.[48] The position of the two sides ebbed and flowed.[49] But after royal forces failed to check a Burgundian advance on Paris, Louis, a very shrewd diplomat (later dubbed the 'Universal Spider') gave the impression that he was yielding to the League's demands. All these measures, however, were seemingly taken in an underhanded effort to break up the League. Louis was temporizing. Within months of ceding Normandy to his brother, for example, he reclaimed it. In the end, France was saved from collapse by the refusal of the lesser gentry to rise up against its king, and by the alliance of Louis with the citizen class, especially the growing ranks of city dwellers.

[47] Christopher Hare, *The Life of Louis XI: The Rebel Dauphin and the Statesman King* (London and New York: Harper & Brothers 1907), 99–100.

[48] Hare, above n 47, 102.

[49] Hare, above n 47, 102–09.

But the larger war between Louis XI and Charles the Bold continued and entered a new phase. Louis extended an olive branch to certain key members of the League by returning to them various estates and privileges and beginning the process of turning them against Charles. Over the next few years, Charles would win various military campaigns against Louis but could not bring him down. Louis had some success on the battlefield as well and in 1472, after an unsuccessful invasion of France, Charles was obliged to make a lasting truce with Louis. Yet another phase opened in which Charles's projects were to be concentrated primarily on his eastern flank, toward the German-speaking territories. In the meantime, Louis kept his eye on Charles's new endeavours and waited for his chance to destroy Burgundy through new diplomatic alliances.

(iii) Austria, Switzerland and Alsace

To put the case of Peter von Hagenbach into context, one must also consider the situation on Charles's eastern flank—the area that now comprises Switzerland, Austria, and Germany. The Holy Roman Empire took control over the territories of modern Switzerland in approximately AD 1033. Over the next two centuries, certain Swiss cantons entered into a political alliance known as the 'Old Swiss Confederacy'. By the mid-fifteenth century, the Confederates, or *Eidgenossen*, formed a loose affiliation of about a dozen largely independent small states.

Although they had the status of 'imperial immediacy' within the Holy Roman Empire (ie, directly under the Emperor), they had been for some time under the effective control of Austria's ruling family, the Habsburgs. The latter resisted Swiss efforts to gain independence and this led to a series of fourteenth-century battles against Habsburg forces that the Swiss won decisively, most notably the Battles of Sempach and Näfels. By the time Charles assumed the Burgundian mantle in 1465, there was still much bad blood between the fiercely independent Swiss and their former Austrian feudal overlords. And the Swiss were expanding their control over territory in the Rhine region. The Confederacy controlled most of the land south and west of the Rhine to the Alps and the Jura mountains and was poised to take the Sundgau portion of the Rhine territory (southern Alsace). Ultimately, the *Eidgenossen* agreed not to attack this region in exchange for a significant reparations pledge from the Austrians.

Unfortunately for the Austrians, Archduke Sigismund (also known as 'Sigmund') was in dire financial straits and could not afford to pay the Swiss and/or maintain control over his possessions on the Upper Rhine. So he agreed to mortgage these Alsatian lands to Charles the Bold. By the treaty of St Omer, entered into on 9 May 1469, Charles acquired Habsburg possessions on both sides of the Rhine, including the Landgraviate of Alsace, the counties of Ferrette and Hauenstein (with a large part of the Black Forest), the towns of Breisach and Ortenburg, and the four so-called 'Forest Towns' of Rheinfelden, Seckingen, Lauffenburg, and Waldshut. In exchange, Sigismund received 50,000 Rhenish florins and a promise from Charles that he would pay the Swiss reparations in the sum of an additional 10,000 Rhenish florins. Title to these possessions could be redeemed by Sigismund but only upon a lump-sum payment made at a specified place—it

was not contemplated that Sigismund would ever be solvent enough to regain his Upper Alsace lands.

So what exactly did Charles acquire for 60,000 florins? His new possessions might be described as an archipelago of city-states more or less accustomed to independence given the absentee-landlord role played by Sigismund while he was nominally in control. Assuming Charles could keep the citizens of these newly-acquired towns happy, the Treaty of St Omer put him in quite an advantageous position. In concluding the entente with Sigismund, Charles and the Austrian archduke both gave and received pledges of friendship and support to one another. After all, Charles would be solving for the Austrian ruler a thorny financial and administrative problem in Alsace and in return Sigismund would help quench the Burgundian's thirst for territorial aggrandizement. At the same time, Charles would extinguish Sigismund's reparations debt to the Swiss Confederacy. This could help strengthen the longstanding friendly relationship between the Confederacy and the House of Burgundy.

On the other hand, from Charles the Bold's perspective, the new arrangement was fraught with peril. For one thing, the *Eidgenossen*, likely believing Sigismund incapable of satisfying his reparations debt, were prevented by Charles's assumption of the debt from acquiring new territory. Moreover, the new Austro–Burgundian arrangement might have convinced the Swiss that Charles had formed a strong alliance with Sigismund, the Confederacy's perceived oppressor and sworn enemy. This could potentially put Charles in a precarious position vis-à-vis the militarily powerful *Eidgenossen*.

Moreover, the smaller power brokers of the parts of Upper Alsace not within Burgundian control—the independent city leaders and Imperial regional governors, for example, would now have to coexist with the acquisitive Duke of Burgundy in their backyard, and they were justifiably concerned about Charles's territorial ambitions. Further, all these independent neighbourhood polities, in addition to those in Charles's possession, were German-speaking. The Burgundians were francophone—and no overlord in this largely Germanic region had ever spoken a foreign language. That could certainly become a source of friction.

So while the Treaty of St Omer could understandably have brought many strategic advantages to Charles, it certainly had the potential to upset the relatively harmonious relations his duchy had previously established in the region. If governed judiciously, the new Alsatian possessions might promote ducal prestige, generate tax revenue, serve as a strategic buffer and perhaps further solidify Charles's relations with his Germanic allies. If governed maladroitly, Charles could alienate his eastern neighbours and perhaps make attractive an alliance with the ever-scheming Louis XI that could squeeze Burgundy within dangerous pincers.

Thus, Charles the Bold seems to have needed someone effective and politically astute to administer these territories. In the event, he chose Peter von Hagenbach, a trusted lieutenant whose dog-like loyalty and blind devotion had endeared him to Charles through years of Burgundian court intrigue and military conquest. Unfortunately, while the ideal candidate might have won the region over with a

light touch and effective diplomacy, Charles's deputy ultimately terrorized Upper Alsace with blunt force trauma and what some accounts would describe as a reign of terror.

(iv) Peter von Hagenbach

The origins of Peter von Hagenbach are rather obscure[50]—even his year of birth is unknown (although estimated to be 1420).[51] His father Anton was a lesser nobleman of southern Alsace and his family had been under the feudal dominion of the Habsburgs since the middle 1300s. Anton hailed from the town of Hagenbach, where his family's like-named ancestral castle was located. This small municipality was within the vicinity of Mulhouse, a larger town that would later factor prominently in Peter's life as a servant of the Duchy of Burgundy. Records indicate that Anton von Hagenbach became a citizen of Thann and entered into the service of the powerful Habsburgs.[52] In 1428, he became the mayor of Thann and in 1440 he was named Habsburg Council at the Court of Ensisheim.[53]

When Anton von Hagenbach met Peter's mother, Catherine, she was the widow of a French nobleman by the name of Jean de Montjustin, the Lord of Belmont.[54] Belmont's castle, in which Peter was raised, was located in the Franche-Comté, a nearby francophone Burgundian province. Reflective of his parents' respective mother tongues, Peter was fully fluent in French and German.[55]

Peter von Hagenbach appears to have received his education in a francophone monastery and then turned to a life of military and ducal court service. Historian Werner Paravicini writes that an 'unknown intermediary opened the door for him [Hagenbach] to the Burgundian court'.[56] An early reference to his service to the Duchy appears in 1443, when he apparently took part in a military operation in Luxembourg conducted under the aegis of Charles the Bold's father, Philip the Good.[57] Perhaps not coincidentally, in the same year, Peter was made a Knight of the Order of St George of Burgundy.[58] The year 1443 played a significant role in Hagenbach's personal life too as he then married Marguerite d'Accolans, a noblewoman of the Franche-Comté.[59]

By 1448, Sir Peter von Hagenbach's darker side had begun to manifest itself. According to historian Hildburg Brauer-Gramm, Hagenbach kidnapped a certain Marquard Baldeck, a banker from Basel with whom he had dined the previous evening.[60] Hagenbach demanded a ransom from Baldeck's family.[61] The plot was foiled when, at Philip the Good's behest, Baldeck was immediately released without the ransom being paid.[62]

[50] Heinrich Witte, 'Zur Geschichte des burgundischen Landvogts Peter von Hagenbach', *Zeitschrift für die Geschichte des Oberrheins*, *8* (1893), 646.
[51] Brauer-Gramm, above n 44, 12.
[52] Brauer-Gramm, above n 44, 12.
[53] Brauer-Gramm, above n 44, 12–13.
[54] Brauer-Gramm, above n 44, 14.
[55] Brauer-Gramm, above n 44.
[56] Paravicini, 'Parler d'amour au XVe siècle', above n 34, 1277.
[57] Paravicini, above n 34, 1277.
[58] Paravicini, above n 34, 1277.
[59] Brauer-Gramm, above n 44, 14.
[60] Brauer-Gramm, above n 44, 14.
[61] Brauer-Gramm, above n 44, 14.
[62] Brauer-Gramm, above n 44, 14. This seems a foreshadowing of Hagenbach's future interaction with Swiss citizens and his eventual trial and execution as Charles's Alsatian Bailiff. It should be noted that Hagenbach subsequently wrote a letter to the local Habsburg bailiff attempting to justify his actions.

In the early 1450s, Hagenbach's name first appears in official Burgundian court records as 'Aquenbacq' or 'Archembault'.[63] By 1460, he was a maitre d'hotel at the ducal court and the career prospects of the ambitious courtier were rapidly improving.[64] According to Duchy of Burgundy expert Richard Vaughan:

> Soon after then [Hagenbach] took sides with Charles, then count of Charolais, in the quarrels between him and his father Philip the Good, and he was able to earn Charles's undying gratitude in the summer of 1462 when he exposed Jehan Coustain's alleged plot to murder him, a plot which he himself may have contrived on Charles's behalf in order to eliminate Coustain and discredit his patrons the Croys. It was probably soon after this that Charles wrote to Hagenbach addressing him as 'my very good friend' and assuring him that he would neither abandon nor fail him whatever might happen.[65]

Hagenbach's exploits on the battlefield during the 1460s further endeared him to Charles, particularly with 'Hagenbach winning military renown in the 1465 war of the League of the Public Weal'.[66] That conflict began in June with Charles attacking the French Count of Nevers's towns of Péronne, Roye, and Montdidier, with Péronne being 'captured by a nocturnal escalade' in October—Hagenbach's 'most brilliant exploit', according to Richard Vaughan.[67]

Vaughan also credits Hagenbach's military renown to his participation in Charles's bloody campaigns against Dinant and Liège, two rebellious towns in the Burgundian territory of what is now Belgium.[68] For example, disregarding the preference for nocturnal siege operations, Hagenbach brazenly took the lead in charging Dinant in the middle of the day. Kirk notes that his 'vigour and resolution strongly recommended him to the favour of a commander [Charles the Bold] personally so distinguished for these qualities, and obtained for him ultimately a place in Charles's confidence productive of fatal consequences to both'.[69]

Hagenbach was also valuable to Charles off the battlefield. Owing to his fluency in German, for example, he was frequently utilized on diplomatic missions.[70] It was Hagenbach, for instance, who negotiated the 1465 alliance between Burgundy and the count palatine of the Rhine.[71] In the estimation of Richard Vaughan: 'In the summer of 1469, [Hagenbach] was an obvious choice for the post of ducal bailiff in Upper Alsace.'[72]

(b) Points of divergence in the historical record—the bailiff years

(i) The demonic portrait of Hagenbach

There are differing accounts of Hagenbach's time as Charles's bailiff in Upper Alsace. The older and more contemporaneous accounts tend to paint him as a tyrannical,

[63] Brauer-Gramm, above n 44, 14.
[64] Brauer-Gramm, above n 44, 14, 16.
[65] Vaughan, above n 2, 255. This is certainly ironic in light of later events.
[66] Vaughan, above n 2, 255.
[67] Richard Vaughan, *Philip the Good: The Apogee of Burgundy* (Woodbridge: The Boydell Press, 2002), 391.
[68] Vaughan, above n 67, 256.
[69] Vaughan, above n 67, 256.
[70] Vaughan, above n 2, 255.
[71] Vaughan, above n 2, 255.
[72] Vaughan, above n 2, 255.

sexually deviate, bloodthirsty monster. This portrait was nicely encapsulated by French historian Prosper de Barante. In introducing readers to Hagenbach, Barante noted that the Alsatian bailiff was 'one of the most cruel and violent men to hold power over a people'.[73] 'He knew no justice', Barante elaborated, 'and the slightest refusal to satisfy his whims was tantamount to a death sentence'.[74] Barante observed that he had people killed without even giving the slightest clue as to why—many of them with his own hand.[75] For example, Barante described the case of four citizens of the Alsatian town of Thann who were sent by the Thann government to complain to Hagenbach about exorbitant taxation (this incident would eventually become a focal point at Hagenbach's 1474 trial).[76] 'Without any sort of trial', Barante recounted, 'Hagenbach had these four unfortunate burghers decapitated'.[77]

As this incident reveals, Hagenbach's taxes were responsible for sowing much discontent in the Upper Alsace. One of the conditions on which the Alsatian lands were mortgaged to Charles, Barante explained, was that the liberties of their residents be preserved and respected.[78] Barante recounted that Hagenbach paid no heed to that guarantee and ultimately violated it by imposing a one-*pfennig* tax on each bottle of wine consumed in the region.[79] Barante then detailed a series of other violations of the Alsatian rights under his stewardship: (1) farmers were subjected to compulsory labour service and thereby prevented from engaging in their agricultural work; (2) soldiers were regularly quartered in the homes of the citizens without their consent and the soldiers would mistreat the homeowners without the latter having any legal protection or recourse; (3) noblemen were deprived of their right to hunt; and (4) sexual violence was visited on young girls from all walks of life and classes, including nuns.[80]

With regard to sexual depredations, Johannes Knebel, the Basel chaplain, reported that the bailiff became acquainted with a cloister of nuns in Breisach.[81] Among them was a beautiful young vestal.[82] Knebel reported that Hagenbach 'stared at her with burning desire'.[83] He threatened her with death if she did not submit to his desires.[84] One of his lieutenants searched the cloister, found the attractive holy woman, and took her to Hagenbach, who raped her.[85] Hagenbach's lieutenant threatened the other nuns with death for having attempted to hide Hagenbach's victim.[86]

[73] Barante, above n 40, vol 9, 405.
[74] Barante, above n 40, vol 9, 406.
[75] Barante, above n 40, vol 9, 406.
[76] Barante, above n 40, vol 9, 406. These killings would eventually be the basis of one of the counts against Hagenbach at his 1474 trial.
[77] Barante, above n 40, vol 9, 406. A point that supports the revisionists is that other specific examples of murder are not given. It would seem that Hagenbach's chief atrocity crime was mass rape.
[78] Barante, above n 40, vol 9, 406.
[79] Barante, above n 40, vol 9, 405–6.
[80] Barante, above n 40, vol 9, 406–7.
[81] Johannes Knebel, *Chronicle of the Chaplain Johannes Knebel from the Time of the Burgundian Wars* (Bahnmaier, 1851), 49.
[82] Knebel, above n 81, 49.
[83] Knebel, above n 81, 49.
[84] Knebel, above n 81, 49.
[85] Knebel, above n 81, 49.
[86] Knebel, above n 81, 49, 49–50.

Prosper de Barante focused on one particularly heinous incident wherein Hagenbach invited a town's married couples to his residence for a party.[87] Once all were assembled, he removed the husbands from his residence and forced the wives to strip naked. Following this, he placed a covering over the head of each woman. The husbands were then ordered to return and inspect the naked bodies of the masked women. Those who were not able to identify their wives in this state were thrown down a long flight of stairs. Those who recognized their wives were rewarded by being forced to ingest copious amounts of alcohol that rendered them fatally ill.[88]

According to Barante, Hagenbach's hatred for the inhabitants of his ducal charge was particularly intense toward the townspeople, as opposed to the rural residents.[89] And this included the towns outside the Duke's direct authority, such as Strasbourg, Colmar, Schelestadt, and other cities under Imperial aegis. Hagenbach is supposed to have subjected them to a regular litany of insults and poor treatment. Strasbourg in particular seemed to bear the brunt of the bailiff's wrath. He subjected Ortenberg Castle, owned by the Strasbourgeois, to a military siege and then occupied it as ducal property. He imposed the dreaded wine tax on Strasbourg and then demanded that its citizens swear an oath of allegiance to the Duke of Burgundy.[90] 'In the end', writes Barante, 'no one knew when the limits of the bailiff's tyranny would be reached'.[91]

However, Hagenbach's greatest mistake by far, writes Barante, was alienating the Swiss, the House of Burgundy's traditional ally and good neighbour. This began with Hagenbach's seizure of the seigneury of Schenkelberg, which was property of the Swiss city of Berne. Later on, one of Hagenbach's deputies arrested near the town of Breisach a group of Swiss merchants travelling with their fine cloths to the Frankfurt Fair. 'They were mistreated, their goods were confiscated, and they were imprisoned in the Schuttern Castle, where their captors demanded from them a ransom of 10,000 crowns.'[92] These prisoners were liberated by soldiers of Strasbourg who burned Schuttern Castle to the ground.[93] This helped forge an alliance between the Swiss and the free cities of Alsace.[94]

(ii) The revisionist portrait of Hagenbach

Later chroniclers of the period have taken a much more charitable view of Hagenbach's role in alienating Alsace and its neighbours. In his work, *A History of Charles the Bold, Duke of Burgundy* (1863–67), John Foster Kirk pointed out that surviving contemporaneous accounts, those supporting Barante's history, were written by the chroniclers of Hagenbach's judges and executioners. 'The truth is, these chroniclers—monks and municipal scribes at Basel and Strasburg—recorded simply from day to day, without personal cognisance or investigation, whatever rumours had currency and a special interest in their localities.'[95]

[87] Barante, above n 40, vol 9, 407.
[88] Barante, above n 40, vol 9, 407.
[89] Barante, above n 40, vol 9, 408.
[90] Barante, above n 40, vol 9, 408.
[91] Barante, above n 40, vol 9, 408–9.
[92] Barante, above n 40, vol 9, 410.
[93] Barante, above n 40, vol 9, 411.
[94] Barante, above n 40, vol 9, 411.
[95] Kirk, above n 42, 471.

And the negative reports regarding Hagenbach, he noted, date from his final year in Alsace—there is little to nothing during the first four years.[96] Nevertheless, even Kirk acknowledged that Charles the Bold 'left Alsace to the mercies of a tyrannical steward, the minor villain of the piece, in whom the vices of his principal were mixed with others still more odious, whose cruelty and craft had no false lustre, no redeeming trait'.[97]

British historian Richard Vaughn refused to accept wholesale the cartoonish depiction of Hagenbach 'as the archetypal tyrant, the Burgunidan bogeyman, the iniquitous immoral official of a detested foreign regime'.[98] Instead, Vaughan focused on the fact that Charles was not very concerned about the administration of his Alsatian properties.[99] And thus Hagenbach was left to fend for himself with few resources and little direction. Given his aristocratic sense of superiority, his gruff military demeanour and his disdain of the region's Swiss, urban and lower class citizens, he soon ostracized the Alsatian population.[100]

Vaughn opines that the situation was aggravated by fears of Charles's territorial ambitions in the region and further exacerbated by his administrators' speaking a foreign language:

> Unlike the Austrians, the Burgundians were *welsch*, or French-speaking foreigners, in a thoroughly Germanic area. Their arrival and the administrative activities which accompanied it, aroused the suspicions and distrust of Charles's ally the imperial *Landvogt* of Alsace, Frederick the Victorious, elector palatine of the Rhine, as well as of two of the most powerful and populous cities on the Rhine, Strasbourg and Basel.[101]

Concerns about Charles's desire for land acquisition seemed to reach their peak in September 1473, when he met with Holy Roman Emperor Frederick III in Trier to discuss Charles's possible ascension to the Imperial crown.[102]

Alsatian historian Georges Bischoff has noted that, in addition to local fears about Burgundian expansion, the citizens of the Upper Rhine resented Hagenbach's strict administration and his curbing of corrupt practices in the region.[103] He went so far as to add that Hagenbach's administrative reforms, so abhorred by the Alsatians and Rhenians, presaged the structures instituted by Louis XIV two centuries later.[104] Heinrich Heimpel noted that Hagenbach went through the territory with an 'iron sweeper'—imposing duties, improving castles, establishing a road-police, improving trade and organizing a court system moulded after the Burgundian, and reforming cloisters.[105] Certainly, one of Hagenbach's most impressive achievements was in the area of public safety and roads administration. During his tenure, Charles Nerlinger pointed out, 'security on the roads was so good that one could carry across the region gold or silver attached to nothing more than a bindle stick'.[106]

[96] Kirk, above n 42, 471, 472. [97] Kirk, above n 42, 471, 475.
[98] Vaughan, above n 2, 286. [99] Vaughan, above n 2, 91–5.
[100] Vaughan, above n 2, 99. [101] Vaughan, above n 2, 261.
[102] Vaughan, above n 2, 105.
[103] Georges Bischoff, 'Preface' to Claerr-Stamm, above n 29, 8–9. [104] Bischoff, above n 103, 9.
[105] Heimpel, above n 5, 444. [106] Nerlinger, above n 42, 148.

Vaughan believed that Burgundian problems in the region were well illustrated in the case of the imperial city of Mulhouse, whose citizens had been enduring a wave of criminal attacks by brigands in the region.[107] In response, in May 1470, Hagenbach, 'in his typically forthright manner', demanded that Mulhouse 'should accept in perpetuity the protection of the Duke of Burgundy and his successors… But though the Burgundian bailiff stormed, threatened, and coaxed Mulhouse… she remained resolute in her opposition to any sort of Burgundian penetration'.[108] Over time, the Alsatian population was subjected to a rising level of insults, threats and occasional physical violence—behaviour that in the final months of his service Vaughan described as 'increasingly arbitrary, offensive and indecorous'.[109]

(c) Hagenbach's downfall

Regardless of whether one subscribes to the older view of Hagenbach as bloodthirsty monster or the revisionist version of him as tactless bully, one thing is certain: he managed to whip up hatred within the region and unify the citizens of the Upper Rhine in passionate opposition against him. With encouragement from Louis XI, in March–April 1474, the Swiss Confederation, the Austrians and the free/imperial towns entered into an alliance, known as the 'League of Constance', to achieve 'the peace of the land' and extricate it 'from the tyranny of the Duke of Burgundy and his wicked bailiff Peter von Hagenbach'.[110] The first order of business was to redeem Sigismund's mortgage from Charles the Bold. This was achieved through the funding of the towns of Basel, Colmar, Sélestat, and Strasbourg.[111] Subsequently, Sigismund appointed his own bailiff, Sundgau nobleman Hermann von Eptingen, to replace Hagenbach.[112]

By this point, events were closing in on Peter von Hagenbach and he knew it. He appealed to Charles the Bold for additional troops but the request was denied as Charles had military ventures occupying his troops in other parts of Europe including the Low Countries and Lorraine.[113] Thann had been Hagenbach's headquarters but he feared for his safety there since its citizens had, from his perspective, plotted against him the previous summer.[114] So he decided to make his stand in Breisach, a walled and more easily defensible town on the Rhine,[115] and he fortified it with a large garrison of Picard and German mercenaries.[116] It was bruited about town that Hagenbach planned to expel the citizens of Breisach and then drown them in the Rhine. There seemed to be a great sense of urgency that League of Constance troops launch an assault against the Burgundians and save Breisach's civilians.

107 Nerlinger, above n 43, 95.
108 Nerlinger, above n 43, 95.
109 Vaughan, above n 2, 283.
110 Vaughan, above n 2, 278.
111 Vaughan, above n 2, 278.
112 Vaughan, above n 2, 284.
113 Vaughan, above n 2, 286; Kirk, above n 41, 478–9.
114 Vaughan, above n 2, 283.
115 Kirk, above n 42, 477.
116 Kirk, above n 42, 477.

(i) The arrest, inquisition and torture

In the end, though, it was not the direct action of enemy troops that led to the Burgundian governor's demise. Unfortunately for Hagenbach, Charles the Bold had not provided sufficient funding for the bailiff's tiny garrison and they began to mutiny against him on Easter Sunday, 10 April 1474. Vaughan notes that the local citizenry which 'had suffered at Hagenbach's hands the total abrogation of their civic institutions and liberties, encouraged and supported them'.[117] The mercenaries were expelled from the city and Hagenbach was placed under house arrest (he had been living in the house of the Breisach mayor and would remain there for a few days).[118] The day after his arrest he was bound in cords.[119] Three days later he was removed to a dungeon in the public prison, his body covered in chains, his wrists secured in handcuffs, and his legs set in stocks.[120]

Prison conditions were apparently quite harsh. A note from his jailers in mid-April acknowledged that 'the harsh handling of the prisoner seems to be in order . . . so he is not able to escape'.[121] Kirk added that 'three strong men were appointed to watch him day and night' until the arrival of Archduke Sigismund.[122] The latter reached Breisach at the end of April and ordered that instruments of torture be brought there from Basel.[123] Sometime during that week, Hagenbach was interrogated while being subjected to torture on six different occasions.[124] While the interrogation focused on Hagenbach's conduct as bailiff in Upper Alsace from 1469 to 1474, it also dealt with Charles the Bold's territorial ambitions, particularly the details regarding his meeting with Holy Roman Emperor Frederick III at Trier in September of 1473.[125]

On 5 May 1474, ostensibly because of poor prison conditions, Hagenbach was taken from the dungeon to what was known as 'The Water Tower' (on the other side of town) for additional interrogation.[126] Unable to move his broken body of his own force, he was transported in a wheelbarrow while onlookers derisively heckled him.[127] During the transfer, he 'cried loudly' and at one point he shouted 'murderer'. He was tortured severely on that day—four separate times. He supposedly admitted to his misdeeds and named accessories.[128] Among other things, he is supposed to have admitted that he intended to remove forcibly the citizens of Breisach from the

[117] Vaughan, above n 2, 283.
[118] Vaughan, above n 2, 283. See also Kirk, above n 42, 484.
[119] Kirk, above n 42, 487.
[120] Kirk, above n 42, 488. See also Bernhard Emanuel von Rodt, *Die Feldzüge Karls des Kühnen, Herzogs von Burgund* (Schaffhausen: Hurter, 1843), 221.
[121] Von Rodt, n 120 above, 221.
[122] Kirk, above n 42, 488.
[123] Hermann Heimpel, 'Das Verfahren gegen Peter von Hagenbach zu Breisach 1474', *Zeitschrift für Geschichte des Oberrheins, 55* (1942), 321, 346–7.
[124] Heimpel, see above n 123, 347, 349. In all likelihood, according to Heimpel, the primary torture position consisted of Hagenbach being hanged by his bound hands with rocks tied to his feet.
[125] Heimpel, see above n 123, 348–9. See also Kirk, above n 42, 489.
[126] Heimpel, above n 123, 349; Kirk, above n 42, 488 (Kirk suggests the prisoner was transferred to the tower because it offered superior torture facilities).
[127] Von Rodt, above n 120, 223.
[128] Heimpel, above n 123, 348. The record is not entirely clear as to which crimes he would have confessed.

city with the intention of eventually exterminating them.[129] One of Hagenbach's associates, an official in the Breisach government, was detained and questioned about the bailiff. Pursuant to physical coercion, he admitted that Hagenbach intended to deport the citizens of Breisach and have them exterminated.[130]

(ii) The trial

Now that Hagenbach had confessed to his supposed crimes, what was to follow? In that era, one might have supposed that the prisoner would be summarily executed. He escaped lynch-mob justice on Easter Sunday only thanks to Breisach resident Friedrich Kappelar's decision to arrest him and await instructions from Archduke Sigismund.[131] In his book *Die Feldzüge Karls des Kühnen* (1843), German historian Bernhard Emmanuel von Rodt related that, when presented with the situation, Sigismund made a startling decision for the time. Given Hagenbach's position as bailiff to the Duke of Burgundy, Sigismund concluded that he was entitled to an open, public hearing and 'his fate would be decided by it'.[132] Eminent German historian Hermann Heimpel has noted that the contemplated trial was consistent with other legal actions in late fifteenth-century Swabia.[133]

What might have seemed entirely unprecedented, though, was the make-up of the court that would sit in judgment of Hagenbach. He was not to be tried by a local judge. Instead, numerous representatives of sovereigns from around the region, twenty-eight in all—including sixteen knights, would sit as part of an international ad hoc tribunal.[134] As described by Georg Schwarzenberger: 'Eight of [the judges] were nominated by Breisach, and two by each of the other allied Alsatian and Upper Rhenanian towns [Strasbourg, Sélestat, Colmar, Basel, Thann, Kenzingen, Neuburg am Rhein, and Freiburg im Breisgau], Berne, a member of the Swiss Confederation, and Solothurn, allied with Berne.'[135]

In fact, each sovereign represented a member of the League of Constance (Berne being the only representative of the Swiss cantons).[136] As one contemporaneous account put it, Hagenbach 'was judged on behalf of all the members of the alliance'.[137] Heimpel elaborated: 'The assembly of this court shows that the League of Constance . . . was more than a "political union" in the modern sense of the term; those united saw themselves as a legal community, such as a medieval union, and such entities set up courts for special cases.'[138] As Breisach's sovereign, Austria provided the presiding judge.[139]

On 9 May 1474, at 8 am, Peter von Hagenbach's 'special' case opened for trial before an enormous crowd assembled outdoors in front of the Breisach mayor's residence (not far from the Water Tower).[140] The open-air setting was consistent

[129] Claerr-Stamm, above n 29, 171.
[130] Claerr-Stamm, above n 29, 171.
[131] Heimpel, above n 123, 345.
[132] Von Rodt, above n 120, 223.
[133] Heimpel, above n 123, 338.
[134] Schwarzenberger, above n 16, 463.
[135] Schwarzenberger, above n 16, 463.
[136] Claerr-Stamm, above n 29, 175; Kirk, above n 42, 494.
[137] Vaughan, above n 2, 285.
[138] Heimpel, above n 123, 325.
[139] Schwarzenberger, above n 16, 463.
[140] Claerr-Stamm, above n 29, 175.

with an old Germanic judicial custom that was still observed at the time.[141] Thomas Schutz, the chief magistrate of Ensisheim, was designated as the tribunal's presiding judge.[142] The nominal trial prosecutor was Sigismund's new Alsatian bailiff—Hermann von Eptingen.[143] Eptingen, for his part, chose Heinrich Iselin, one of the commissioners from Basel,[144] to present the prosecution's case to the court.[145] The other representative from Basel, Hans Irmy, took on Hagenbach's representation.[146]

The proceedings began with the presiding judge requesting the prosecution to make its opening statement.[147] According to most accounts, Iselin began dramatically by explaining to the tribunal that Hagenbach had 'trampled under foot the laws of God and man'.[148] He then read the indictment, consisting of four counts:

1. Murder in relation to the 1473 beheading of the four Thann citizens without any validly rendered judgment in violation of imperial law;[149]
2. Perjury in relation to Hagenbach's oath to uphold the laws of Breisach, which he violated by restructuring certain governmental offices, stripping certain government representatives of their power, illegally quartering soldiers in homes, pillaging and plundering property, and imposing onerous taxes on the town's citizens;
3. Conspiracy to commit murder in relation to the supposed plot to expel and exterminate the citizens of Breisach;[150]
4. Rape of numerous women and girls in the region, including nuns.[151]

141 Claerr-Stamm, above n 29, 175.
142 Claerr-Stamm, above n 29, 175.
143 Heimpel, above n 123, 324–5.
144 Kirk, above n 42, 435.
145 Claerr-Stamm, above n 29, 175.
146 Claerr-Stamm, above n 29, 175.
147 Heimpel, above n 123, 325.
148 Schwarzenberger, above n 16, 465. Heimpel disputes that Iselin used the expression 'trampled under foot the laws of God and man'. See Heimpel, above n 5, 450 n 1 ('I find nowhere that the prosecutor said: [in English from newspaper article] "Hagenbach's deeds outraged all notions of humanity and justice and constituted crimes under national law" [in German] and that he [in English] "trampled under foot the laws of God and men and had committed what would be called today crimes against humanity" '). On the other hand, French historian Prosper de Barante and British historian John Foster Kirk support Schwarzenberger's account of Iselin's opening statement regarding Hagenbach's trampling 'under foot the laws of God and men'. See Barante, above n 40, vol 9, 15 ('Pierre de Hagenbach, chevalier, maître d'hôtel de monseigneur le duc de Bourgogne, et son gouverneur dans les pays de Ferrette et Haute-Alsace, aurait dû respecter les privilèges réservés par l'acte d'engagement; mais il n'a pas moins *foulé aux pieds les lois de Dieu et des hommes* que les droits jurés et guarantis au pays.' [emphasis added]); Kirk, above n 42, 435 ('the accuser demanded that Hagenbach should be adjudged worthy of death, as a murderer, perjurer, and a general *transgressor of the laws both of God and men*.' [emphasis added]).
149 Vaughan noted that the beheadings were in response to an alleged uprising in Thann against the Duke of Burgundy on 3 July 1473. See Vaughan, above n 2, 285.
150 The indictment appears not to have used the term 'conspiracy' but this was the gist of the charge.
151 Kirk, above n 42, 494–5; Claerr-Stamm, above n 29, 177; Vaughan, above n 2, 285. For the fourth count of the indictment, the historians do not actually use the word 'rape' in describing Hagenbach's transgressions with women in the region. Still, that appears to be the clear import of the charge. See Von Rodt, above n 120, 224–5 ('noting that Hagenbach violently mishandled honourable women, including virgins and nuns.'). Claerr-Stamm also points out that all the charged conduct was of relatively recent vintage (within the previous year) and did not cover most of the period of Hagenbach's governorship.

Given these charges, the prosecutor notified the tribunal that he would be seeking a death sentence.[152]

Hagenbach's counsel, Hans Irmy, then gave his opening statement. He began by challenging the jurisdiction of the tribunal. He argued forcefully that 'the Tribunal was not competent to decide this case' because 'only the Duke of Burgundy could be [Hagenbach's] judge and his superior'.[153] The tribunal rejected the jurisdictional challenge and found that it was competent to sit in judgment of Hagenbach for the crimes charged.[154]

The prosecution then put on its case-in-chief, which consisted of the testimony of six witnesses who had heard Hagenbach's confession to the crimes charged.[155] After this, Hagenbach asked for a recess and requested that two additional attorneys be added to his defence team. The tribunal then assigned to the Hagenbach team one representative each from Colmar and Sélestat.[156] After Hagenbach conferred with his attorneys, the defence put on its case, which consisted of the following arguments:

1. Regarding the execution of the Thann citizens, they had tried to rise up in rebellion to Burgundian rule and were executed pursuant to the Duke's orders with the consent of the Holy Roman Emperor;
2. He acknowledged he swore to respect the Breisach citizens' rights but they subsequently swore a new oath of allegiance to the Duke which had the effect of overriding Hagenbach's pledge regarding previously existing rights—the actions he took after the Breisachers swore their new oath of allegiance was pursuant to orders from the Duke;
3. Regarding the quartering of troops, that was again pursuant to the Duke's order—Hagenbach does not seem to have directly answered the charge that he planned to deport and exterminate the Breisachers;
4. As to the charge of rape, Hagenbach responded that his accusers were just as guilty as he was of that crime and that he never actually committed violence against the women in question—he paid to have consensual sex with them.[157]

Given that all of Hagenbach's conduct was at the behest of and under the aegis of the Duke, his attorneys renewed their motion to dismiss on jurisdictional grounds—only the Duke could sit in judgment of his servant.[158] In the words of defence counsel Hans Irmy:

> Sir Peter von Hagenbach does not recognise any other judge and master but the Duke of Burgundy from whom he had received his commission and his orders. He had no right to question the orders which he was charged to carry out, and it was his duty to obey. Is it not known that soldiers owe absolute obedience to their superiors? Does anyone believe that the Duke's *Landvogt* could have remonstrated with his master or have refused to carry out

[152] Claerr-Stamm, above n 29, 177. [153] Von Rodt, above n 120, 224.
[154] There is no indication that the tribunal elaborated or provided specific reasons for its rejection of Hagenbach's jurisdictional challenge.
[155] Von Rodt, above n 120, 225. [156] Claerr-Stamm, above n 29, 177.
[157] Claerr-Stamm, 177–80, n 29. [158] Claerr-Stamm, 180, n 29.

the Duke's orders? Had not the Duke by his presence subsequently confirmed and ratified all that had been done in his name?[159]

After presentation of the defence, the motion appears to have held more sway.[160] Remarkably, the judges seem to have recognized that it was a close call. So persuasive must the defence argument have been that prosecution attorney Heinrich Iselin actually made a motion to withdraw the charges.[161]

In response, a new attorney for the prosecution, Hildebrand Rasp, was appointed and he reasserted the charges of the indictment, arguing as well that Hagenbach confessed to many other crimes that were not even charged.[162] The defence responded that such admissions were invalid as they were the product of torture. Rasp's dubious retort: the admissions were made when Hagenbach was not actually on the rack so they were made freely.[163] Several new witnesses were then called to testify and they corroborated that Hagenbach did not make the confessions during torture.[164]

Nevertheless, Rasp advanced an alternative argument. Even if the confessions were deemed tainted, Hagenbach had committed the crime of *lèse-majesté*. In other words, by testifying that Charles and the Holy Roman Emperor had ordered conduct by Hagenbach that was manifestly in violation of the law, he slandered these leaders.[165] It was not possible, he concluded, that they could have given Hagenbach such orders.[166]

Hagenbach's defence counsel Hans Irmy then called for an adjournment of the trial.[167] He wanted time to serve the Duke of Burgundy with interrogatories asking whether, in fact, he had given Hagenbach the orders as asserted by the defence.[168] In the annals of the law, this was a watershed moment. If the judges had granted the continuance motion and sought to verify the factual accuracy of Hagenbach's testimony regarding the Duke's directives, the defence of obeying superior orders would have been implicitly reaffirmed. Instead, the Tribunal made history. It found an adjournment unnecessary.[169] Even if Hagenbach had received orders to commit the charged conduct, he should have known such orders were patently illegal.[170]

The parties having rested their cases, the Tribunal retired and deliberated for some time. According to Charles Nerlinger:

The President of the tribunal then addressed the judges and asked if they found Peter von Hagenbach guilty. The judge representing Strasbourg, Peter Schott, rose and asked that

[159] Schwarzenberger, above n 16, 465.
[160] Schwarzenberger, above n 16, 465.
[161] Schwarzenberger, above n 16, 465.
[162] Schwarzenberger, above n 16, 465.
[163] Heimpel, above n 5, 331. Of course, that does not touch on the fact that any such additional criminal conduct was not even charged.
[164] Kirk, above n 42, 498.
[165] Claerr-Stamm, above n 29, 180. The crime of *lèse-majesté* consists of affronting the dignity of the monarchy. See Frank Munger, 'Globalisation, Investing in Law, and the Careers of Lawyers for Social Causes: Taking on Rights in Thailand', *New York Law School Review*, *53* (2008–09), 770, n 109 ('The critical element is an affront to the monarchy, usually through speech, rather than the veracity of the representation. The crime has long since ceased to be meaningful in Europe, but continues to play a role in Thai politics.').
[166] Claerr-Stamm, above n 29, 180.
[167] Claerr-Stamm, above n 29, 180.
[168] Claerr-Stamm, above n 29, 180.
[169] Schwarzenberger, above n 16, 466.
[170] Schwarzenberger, above n 16, 466.

he and the other judges be allowed to retire and deliberate on the weighty issue they were asked to resolve. They remained for a long period in deliberations, more than one of them undoubtedly aware that his sense of confidence regarding the bailiff's guilt had been shaken. Finally, they returned and in hushed silence they declared slowly, one after the other, that Peter von Hagenbach was guilty and sentenced him to death.[171]

According to John Foster Kirk, a herald advanced and, standing in front of Hagenbach, declared his degradation from the order of the Knights of St George's Shield.[172] 'Another functionary followed, who, with a glove of mail, struck him a blow upon the right cheek.'[173]

(iii) The execution

The Tribunal had not specified in what manner the sentence would be carried out. The judges permitted Hagenbach to be heard on this issue. Given that the manner of his execution would likely shape the way posterity viewed his legacy, the heretofore stoic *Landvogt* suddenly became emotional:

> [The prisoner] lost, for the first time, the firmness and composure which he had manifested throughout the day, and which had been rendered the more conspicuous by the contrasted spectacle of his enfeebled and emaciated frame. His head sank upon his chest. His red eyes, instead of their customary flashes of menace and derision, sent forth from their deep recesses a glance of timid supplication. 'Have pity', he whispered, 'and execute me with the sword!' Strange to say, the appeal was not disregarded. Each member of the court, as he was called upon by name, gave his voice that Hagenbach should die by the sword.[174]

Hans Irmy, for his part, fought hard for his client to the last. He renewed his motion to adjourn the proceedings to seek verification from the Duke that he had given his bailiff the supposed orders that gave rise to the charged crimes.[175] This final appeal was rejected.[176] It was 4 pm and the trial was over.[177]

Preparations were then made for the execution. The judges rode on horseback at the head of a long, torch-illuminated procession toward a field just outside of town.[178] The condemned man was marched on foot at the centre of the cavalcade, a confessor holding a crucifix before his eyes as he strode beside him.[179] Apparently, the role of executioner was quite coveted and seven headsmen (from as many different towns) vied for the privilege.[180] The honour was ultimately bestowed on Colmar's official, a 'short man with a short sword'.[181]

On the scaffold, Hagenbach made his last public announcement:

> I am not concerned about my life; I have risked it enough on the field of battle. But I lament that the blood of many an honest man should be shed on my account. For assuredly my noble master, the Duke of Burgundy, will not suffer this deed to go unavenged. I regret neither my life nor my body: I ask only that you forgive me for having done what I have been sentenced

171 Nerlinger, above n 43, 131.
172 Kirk, above n 42, 499.
173 Kirk, above n 42, 499.
174 Kirk, above n 42, 499.
175 Kirk, above n 42, 499–500.
176 Kirk, above n 42, 499–500.
177 Claerr-Stamm, above n 29, 182.
178 Kirk, above n 42, 500.
179 Kirk, above n 42, 500.
180 Kirk, above n 42, 500.
181 Kirk, above n 42, 500.

for and for other things even worse than that. Those of you for whom I served as governor for four years, please forgive what I have done through lack of wisdom or through malice. I was only human. Please pray for me.[182]

The disgraced knight then bequeathed his gold chain and sixteen horses to a religious house in Breisach. He asked that this provision be honoured by the profligate Sigismund. His hands were then tied, he genuflected, said another short prayer and finally placed his head on the block. The executioner's blade then sliced through the air and found its mark. Five years to the day after Charles the Bold signed the treaty of St Omer, Burgundy was officially expelled from the Sundgau and its governor was dead.

(d) The aftermath

Kirk reports that, when hearing of Hagenbach's execution, the Duke of Burgundy 'fell into a paroxysm of rage'.[183] Nevertheless, he failed to take immediate action.[184] By summer, though, he was ready for reprisal measures. In August, Burgundian troops, led by Peter's brother Stefan von Hagenbach, conducted a raid in the Sundgau region wherein they looted, pillaged and burnt everything in their path.[185] They murdered and displaced a large number of Alsatian residents and took children to be sold and enslaved.[186]

This incursion might be considered the opening salvo in a protracted conflict between Charles the Bold and the League of Constance, known to history as the 'Burgundian Wars'.[187] The hostilities culminated in three decisive battles. The Duke of Burgundy drove into modern-day Switzerland but his forces were defeated by Confederate troops at the Battle of Grandson in March 1476.[188] Within three months, Charles the Bold had gathered a new army and marched yet again into Swiss territory. But he would lose once more in the June 1476 Battle of Morat.[189] Finally, in January 1477, Swiss troops fighting with an army of the Duke of Lorraine beat Charles in the Battle of Nancy, the war's decisive engagement.[190] Charles himself had taken the battlefield with his troops outside the walls of Nancy and his badly mutilated body was found in a ditch three days after the defeat.[191] Such was the fate of the last of the Valois Dukes of Burgundy.

When Charles the Bold died in battle without sons, Louis XI declared the Duchy extinct, and he absorbed into the French crown its territorial portion lying in modern-day France.[192] The Burgundian Low Countries possessions were ultimately transferred to the Habsburgs (via the marriage of Charles the Bold's daughter, Mary,

[182] Claerr-Stamm, above n 29, 186. [183] Kirk, above n 42, 502.
[184] Kirk, above n 42, 503–4. [185] Vaughan, above n 2, 285.
[186] Kirk, above n 42, 505–6.
[187] Nicholas A. Hooper, *The Cambridge Illustrated Atlas of Warfare: The Middle Ages, 768–1487* (Cambridge: Cambridge University Press, 1996), 150.
[188] Vaughan, above n 2, 375–8. [189] Vaughan, above n 2, 390–5.
[190] Vaughan, above n 2, 429–32. [191] Vaughan, above n 2, 432.
[192] George Ripley and Charles Anderson Dana, *The American Cyclopaedia: A Popular Dictionary of General Knowledge* (New York, NY: D. Appleton, 1873), 451.

to Archduke Maximilian of Austria).[193] This gave rise to two centuries of hostilities between France and the Habsburgs (Spain/Austria) over possession of these lands.[194] And two major conflagrations followed—the Thirty Years War and the War of the Spanish Succession.[195]

(IV) Final Analysis

(1) Who was Peter von Hagenbach?

In life, Peter von Hagenbach played a significant role in bringing about the fall of the House of Burgundy, which ultimately led to a seismic realignment of the European balance of power.[196] In death, he has traditionally been portrayed as evil incarnate and the subject of the world's first international atrocity trial. But is his infamy deserved? And should his legacy take on such mythic proportions? As with most matters related to Hagenbach, it is hard to say with certainty.

But the traditional view seems more consistent with the available evidence. That said, a reasonable argument can be made that any insights into Hagenbach's character and actions during his time as bailiff must be parsed sequentially. Put another way, the Hagenbach of 1469 was not the Hagenbach of 1474. Revisionist historians have emphasized the relative dearth of bad press for Hagenbach during the first years of his Alsatian administration. And that makes sense. At the beginning of the relationship between Hagenbach and the Duke's new subjects, everyone was apparently on his best behaviour (and during that early period, Hagenbach was often away from Alsace still engaging in military service for the Duke).[197]

But over time, the local citizenry grew weary of Hagenbach's insults, his aristocratic animosity towards townspeople and the bourgeoisie, his boorish behaviour, and his use of progressively more strong-arm tactics to raise revenue and exert control over the region for Burgundy. And it did not help that he was perceived as linguistically and culturally foreign—a feudally-oriented francophone in a germanophone region then developing a merchant class and trending toward urbanization. By 1473–74, uneasy relations between a restive population and its by now desperate bailiff deteriorated to such a degree that Hagenbach was arrested, tried and executed.

Revisionist historians also point out that Hagenbach was attempting to enact administrative reforms to help modernize the region and make it run more efficiently. But for that he needed the proper personnel and material. Revisionists contend that, in large part, Charles the Bold's failure to provide him with that is what led

[193] Carlos Ramirez-Faria, *Concise Encyclopaedia of World History* (New Delhi: Atlantic Publishers and Distributors 2007), 683.

[194] *Encyclopaedia Britannica*, 'House of Habsburg' (11th edn, 1910), vol 12, 789.

[195] *Encyclopaedia Britannica*, above n 194, 789.

[196] See Vaughan, above n 2, 255 ('the course of events and with it the entire destiny of Charles the Bold and of Burgundy was decisively affected by the attitudes and antics of Peter von Hagenbach [who] made a [great] impact on history.').

[197] See Claerr-Stamm, above n 29, 112.

to his lieutenant's downfall. The old guard, on the other hand, believed firmly that Hagenbach's own follies, namely his tyrannical, capricious and violent methods, precipitated his demise.

But these superficially competing explanations can perhaps be reconciled. The Duke's financial and logistical support of Hagenbach's administration was indeed lacking. But that does not tell the whole story. With few resources at his disposal, Hagenbach may have chosen to fulfil his duties in a progressively violent and arbitrary manner so as to rule more effectively by fear. He did not have the personnel necessary to quell an increasingly restive population—perhaps terror was used to compensate for this.

Consistent with this view, as resources were choked off even further during the final months of his satrapy, Hagenbach's intimidation tactics escalated until spiralling out of control in 1474. The historical record permits such an inference. The bulk of specific allegations against the Burgundian bailiff are from his final year in power. It would make sense then, that the charges lodged against him at trial were related to conduct of recent vintage. Seen in this light, we can understand that the citizens of the Upper Rhine were at first only berated, taxed and put upon. They were likely terrorized and violated only toward the end. In the words of historian Ruth Putnam: 'It is in this period of Hagenbach's life that the stories of gross excess are told…his personal passions…were permitted to run riot and he spared no wife nor maid to whom he took a fancy'.[198]

What evidence supports the view that the good burghers of Alsace were the victims of Sir Peter's violence? Their treatment of the wayward knight after his arrest is most revealing in this regard. While torture may have been commonplace in ordinary criminal inquisitions of the time,[199] the severity of torment inflicted leads one to believe it was inspired by and directed at the kind of mass, depraved criminality of which Hagenbach has traditionally been accused.[200] Significantly, in this regard, in addition to enduring horrific torture, he was stripped of his knighthood. Degradation of knighthood was exceedingly rare in the Middle Ages and reserved only for the most extreme and infamous crimes.[201]

And there is other evidence to suggest Hagenbach's culpability for atrocities. Most telling perhaps is the trial record itself. Hans Irmy, it must be remembered, mounted a valiant and spirited defence to the very end. And yet the record does not reveal his even attempting to refute the charge that Hagenbach planned to

[198] Ruth Putnam *Charles the Bold, Last Duke of Burgundy* (New York, NY: G.P. Putnam's Sons, 1908), 380. As mentioned previously, rape, as opposed to murder, appears to have been Hagenbach's preferred weapon of terror and atrocity.

[199] See Rinat Kitai-Sangero, 'Detention for the Purpose of Interrogation as Modern "Torture"', *University of Detroit Mercy School of Law Review*, *85* (2008), 156.

[200] On the other hand, it would appear the torture ended once Hagenbach 'confessed' to his crimes.

[201] See The Caputo Family Association, 'Knighthood and Noble Titles', *Noble Dynasty* [website], <http://www.nobledynasty.com/knighthoodandnobletitles.htm> (accessed 28 February 2013) ('In extreme cases…a knight…could lose his honour by formal degradation—a public ceremony in which his accoutrements were taken from him.'); Jeri Westerson, 'Degradation of Knighthood', *Getting Medieval* [blog], <http://www.getting medieval.com> (accessed 28 February 2013) ('It's something in the history of chivalry that doesn't often come up').

exterminate the citizens of Breisach[202] or that he murdered the four petitioning residents of Thann. At most, he offered the rejected defence of superior orders. Nor did Irmy (or Hagenbach, for that matter), directly deny the rape charges (merely objecting that taking women in this fashion was common practice and/or he had paid for services rendered).[203]

Did Hagenbach slaughter thousands of innocent civilians in concentrated liquidation campaigns? There is no evidence to suggest he did—he was not a fifteenth-century proto-Nazi. But the record suggests that he terrorized the local population by murdering civilians, raping numerous women and conspiring to commit a large-scale massacre in Breisach. It should be noted that the rape charges are the most persuasive as there are numerous examples and they were never directly refuted.

And Hagenbach's backstory further validates this view of him. He was the product of a Burgundian ducal culture that was steeped in and glorified violence—the reflection of its bellicose chief, Charles the Bold (known to his enemies as Charles the Terrible).[204] The duchy was in almost a permanent state of war with one enemy or another during Charles's reign.[205] Charles the Bold's Burgundy was in the practice of laying siege to towns and routinely killing civilians who resisted—Liège, Dinant, Neuss—all were subjected to horrific violence by Burgundian troops and Hagenbach played a leading role in the first two.[206] And within that violent culture, Hagenbach was Charles's fiercest, most loyal lieutenant. In that regard, Sir Peter's steadfast reliance on superior orders at trial speaks volumes.

And it is not to be overlooked that a criminal disposition was apparent even before Hagenbach cast his lot with Charles the Bold. The reported kidnapping of Marquard Baldeck, the Swiss banker for whom Hagenbach demanded ransom, is telling in that regard. Hagenbach also seems to have fabricated a murder plot

[202] Émile Toutey provides a plausible explanation for why Hagenbach would have wanted to murder the citizens of Breisach. Hagenbach was aware of other towns that had plotted to kill him during the previous year and, when requesting entry to create defensive fortifications in anticipation of an attack by the League of Constance, he had already been denied admittance with his troops into Thann and Ensisheim. He was only able to gain entry into Breisach because his mercenaries were already there. Given the animosity shown him in these other towns and the previous conspiracy to kill him, Hagenbach did not want to take any chances. Killing Breisach's citizens would have permitted him to use the town as a defensive fortification without the risk of an uprising from its citizens. Émile Paul Toutey, *Charles Le Temeraire et La Ligue De Constance* (Paris: Hachette, 1902), 136–7.

[203] It seems quite implausible to accept that women of the cloth, supposedly among Hagenbach's victims, would have accepted payment for sexual services.

[204] See Hugh Chisolm, *Encyclopaedia Britannica* (1910), 824 (describing Charles as 'violent, pugnacious… treacherous').

[205] See Bruce D. Porter, *War and the Rise of the State* (New York, NY: Free Press, 2000), 29. ('Charles the Bold…waged a decade-long war (1467–77) aimed at carving out a separate Burgundian Kingdom.').

[206] 'Dinant Travel Guide', *Eupedia* [website], <http://www.eupedia.com/belgium/dinant.shtml> (accessed 28 February 2013) (describing the siege as 'the darkest moment in local history' wherein the 'city was completely pillaged and burnt down'); Mark Twain, *Personal Recollections of Joan of Arc* (San Francisco, CA: Ignatius Press, 1989) (recounting the 'unspeakable atrocities which Charles the Bold inflicted upon the men and women and children of Dinant'); Vaughan, above n 2, 40 (explaining that Charles the Bold 'sacked Dinant and demolished Liège'); Nicholas Michael, *Armies of Medieval Burgundy 1364–1477* (Oxford: Osprey Publishing, 1983) (detailing that at the halfway point of a year-long siege, 'the gates of Neuss had been reduced to rubble by Charles's 229 guns [and] everything down to the last rat had been eaten').

against Charles the Bold, which he falsely pinned on a court rival to have him eliminated.[207]

Add to this Hagenbach's contempt for the emerging bourgeoisie and townspeople, as well as a deep animosity toward the Swiss, and his stewardship of the Upper Rhine represented the perfect storm. By 1474, he had indeed become the scourge of the Sundgau. In this regard, it is interesting to note Burgundy expert Richard Vaughan's insight that, in fact, it may have been Hagenbach driving policy and tactics in Charles's Alsatian territory, not the other way around:

> Many of Hagenbach's activities were undertaken at [Charles's] express command, though often as a result of representations made to him by Hagenbach in the first place. It is possible, for example, that Charles only agreed to sign the treaty of St Omer on Hagenbach's persuasion. In the duke's letters to Hagenbach of 8 August 1470 he orders him to undertake the siege and conquest of Ortenberg castle, 'in accordance with your memorandum (*advertissement*)', which seems to imply that Charles was here acting on detailed advice to take Ortenberg sent him by Hagenbach. As to other mortgaged places, the bailiff wrote to Charles describing how he had seized possession of Landser and seeking the duke's approval, which was given on 6 January 1474.... On 26 December 1470 he wrote congratulating Hagenbach on taking Ortenberg.[208]

Finally, it should be pointed out that Hagenbach may be responsible for atrocities in the region, even if he did not personally commit or order them. In particular, the Picard and Wallon mercenaries he hired toward the end of his reign had a well-known reputation for being unruly, violent and hostile toward the local Alsatian population.[209] French historian Émile Paul Toutey, for example, describes Picard soldiers engaging in mass rape of Breisach's women toward the very end of 1473.[210] These troops may have acted on their own initiative but Hagenbach was their superior and, at the very least, he bore command responsibility for their actions.

(2) Was the 1474 Breisach Proceeding history's first international war crimes trial?

Those who critique Georg Schwarzenberger's conclusion that the Breisach Trial was Nuremberg's precursor, spearheaded by German historian Heinrich Heimpel,[211] are supported in this view by two fairly straightforward and superficially compelling arguments: (1) the trial was not 'international' because those who sat in judgment of Hagenbach owed their allegiance to the same sovereign—the Holy Roman Empire; and (2) no war crimes were implicated as the 'war' between Burgundy and the League of Constance had not yet officially begun. Looking at each of these points a little more carefully, however, tends to vindicate Schwarzenberger.

[207] See Vaughan, above n 2, 255.
[208] See Vaughan, above n 2, 99.
[209] Toutey, above n 201, 102.
[210] Toutey, above n 201, 101.
[211] See Heimpel, above n 5, 449.

(a) An 'international' trial?

Nominally, the trial was presided over by a group of judges representing different political entities (primarily city-states, such as Strasbourg and Basel) in the Upper Rhine region. The argument that the trial was not international in nature hinges on the assertion that each of the entities represented was incorporated into a larger political superstructure—the Holy Roman Empire, which had been founded by Charlemagne in the year 800.[212] But is this a credible claim? Many historians are of the view that, by the late Middle Ages, the Holy Roman Empire had 'ceased to be an effective entity'.[213] In particular:

> [Consisting of] more than 300 principalities . . . the Holy Roman Empire emerged from the Middle Ages a weak and fragmented entity. Even the fabled Hohenstaufen Emperors were unable to prevent the emerging sovereignty of territorial princes . . . . Aptly described by Voltaire as neither holy, nor Roman, nor an empire, this historical atavism was moribund long before its final dissolution.[214]

In this sense, by 1474, perhaps it is more accurate to describe the Holy Roman Empire as something more akin to an intergovernmental organization with hundreds of independent member states. Could it be rightly compared, for example, to the modern Commonwealth of Nations, which consists of sovereign states that were formerly part of the British Empire?[215] If so, the men who sat in judgment of Peter von Hagenbach clearly represented sovereign entities, not imperial subjects.

On the other hand, it must be pointed out that the murder charges were based on 'imperial law'. That indicates the Holy Roman Empire may have been a bit more than the modern equivalent of the British Commonwealth. Might it look more like the European Union, for example? Even if that is the case, it does not necessarily diminish the sovereign status of the political entities represented at Breisach that day. To analogize in modern terms, an ad hoc tribunal using European Union law to resolve an issue—but not convened by or operating explicitly under the authority of the European Union—would not signify that the individual European states participating in the tribunal (France and Germany, for example) had lost their sovereignty. In this regard, it cannot be ignored that the Tribunal was convened by Sigismund, the Archduke of Austria, not by Emperor Frederick III.[216]

[212] See, eg, Heimpel, above n 5, 449.

[213] Tony Allan et al, *World and Its Peoples, Germany and Switzerland* (Tarrytown, NY: Marshall Cavendish Reference, 2009), 318.

[214] Roderick Stackelberg, *Hitler's Germany: Origins, Interpretations, Legacies* (London: Routledge, 1999), 26.

[215] See 'Profile: The Commonwealth', *BBC: News* [website], <http://news.bbc.co.uk/2/hi/europe/country_profiles/1554175.stm> (accessed 28 February 2013). In fact, two members of the Commonwealth were not formerly part of the British Empire—Mozambique and Rwanda.

[216] As Heimpel points out, '[t]he staffing of the court was noble-Austrian': above n 5, 446.

(b) *A 'war crimes' trial?*

Regardless of its international nature, the other key issue is whether the Hagenbach inquest can be properly characterized as a 'war crimes' trial. Telford Taylor summarized the argument against calling it a war crimes trial in his *Ministries Case* opening statement: 'The acts of which he was accused were not committed during actual hostilities or in time of war and, therefore, under our modern terminology would be akin more to crimes against humanity than to war crimes.'[217] But Taylor's statement may be erroneous on both factual and legal grounds.

First, from a factual perspective, by April 1474 a state of hostilities did arguably exist between the Duchy of Burgundy and the League of Constance principalities and city-states. The League was formed in March 1474 with the primary purpose of expelling Burgundy from the region. Not coincidentally, at about the same time, Hagenbach took up fortifications in Breisach and prepared for an attack—he knew a state of hostilities existed. Indeed, House of Valois expert Richard Vaughan concludes that there was an 'authentic armed revolt against Charles the Bold [in] Alsace in April 1474'.[218]

Second, from a legal perspective, even assuming Burgundy was not officially at war with the League by April 1474, it is still arguable, under modern conceptions of the law of war, that Hagenbach engaged in war crimes. According to law of war expert Yoram Dinstein, 'belligerent occupation may be carried out without any hostilities either preceding or following it'.[219] Dinstein then elaborates: 'If the occupation of the territory of State A (in whole or in part) by State B is suffused with coercion, the occupation is belligerent and the relationship between States A and B shifts from peace to war (even in the absence of hostilities.)'[220]

In the case of the Burgundian occupation of Alsace, it had clearly turned coercive during the first part of 1474. In the first place, funded by the League of Constance, Sigismund had paid off his debt and he and his League allies sought to reclaim the Alsatian lands held by Charles the Bold as collateral pursuant to the Treaty of St Omer. Consistent with this, Sigismund appointed a new bailiff for the region, Herman Eptingen. The population's entreaties to Charles the Bold to remove Hagenbach had fallen on deaf ears and Hagenbach clearly perceived rebellion in his midst during those final months of service to the Duke. In addition to the defensive fortifications at Breisach, Hagenbach's claim he extra-judicially killed the citizens of Thann on grounds of rebellion attests to this.

Nevertheless, in the absence of a more detailed bill of particulars, we cannot know with certainty which of Hagenbach's charged crimes took place during this period of coercion. In fact, it is difficult to identify the precise date on which the occupation could be safely described as 'coercive'. Nor is it clear whether a coercive occupation in 1474 existed in the same manner and degree in each of the Alsatian

[217] *US v Ernst von Weizsaecker* above n 14, 96–7.
[218] Vaughan, above n 2, 403.
[219] Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge: Cambridge University Press, 2009), 31.
[220] Dinstein, above n 219, 35.

territories occupied by Charles the Bold where any of Hagenbach's charged crimes may have occurred. And so, as is true with so much else in this case, no definitive conclusions are possible.

(3) Crimes against humanity?

But perhaps it is well to reconsider Telford Taylor's analysis that Hagenbach was charged and convicted of misdeeds akin to the modern formulation of crimes against humanity. For ICL purposes, along with the rejection of the superior orders defence, this could be the trial's most significant legacy. Modern experts routinely quote prosecutor Heinrich Iselin's opening charge that Hagenbach had 'trampled under foot the laws of God and man'. But where is that supported in the historical record? Heinrich Heimpel contends it is nowhere to be found in the original source materials.[221] Of the non-contemporaneous historians, Prosper de Barante appears to be the earliest quoted source of Iselin's most famous words. And from that source, succeeding generations of historians have quoted one another, in echo chamber fashion, as support for Iselin's weighty utterance. But what exactly are the words used in Barante's treatise? The relevant passage follows:

> On 4 May 1474 [Hagenbach] was…brought before his judges on Breisach's town square…Henrich Iselin, of Basel, then addressed the court as Herman Eptingen's representative, acting on behalf of Duke Sigismund and the country. He spoke *more or less* in these terms: 'Peter von Hagenbach, knight, chief steward of his lord the Duke of Burgundy, and the Duke's governor in the territory of Ferrette and Upper Alsace, should have respected the privileges he swore to protect when taking his oath of office; but not only did he violate the rights pledged and guaranteed in this country, he *trampled under foot the laws of God and man*.'[222]

And where exactly did Barante himself find evidence of Iselin's peroration? Barante's treatise offers no clues—there is no specific citation in support of the text (or approximate text). Consistent with Heimpel's conclusion, my research has not unearthed reports of that exact language in contemporaneous accounts.[223] There are hints of it, however, in the journal of Basel's diarist Johannes Knebel, the most frequently quoted contemporary chronicler (and, according to historian Charles Nerlinger, 'the most reliable source').[224] For example, Knebel quotes Iselin in his

[221] Heimpel, above n 5, 450 n 1.

[222] Barante, above n 40, vol 9, 14–15 [emphasis added]—author's translation. 'More or less' might also be translated as 'approximately.' The original French text reads as follows: 'Pierre de Hagenbach, chevalier, maître d'hôtel de monseigneur le duc de Bourgogne, et son gouverneur dans les pays de Ferrette et Haute-Alsace, aurait dû respecter les privilèges réservés par l'acte d'engagement; mais il n'a pas moins *foulé aux pieds les lois de Dieu et des hommes* que les droits jurés et guarantis au pays.'

[223] In addition to Knebel's diary and the previously mentioned *Reimchronic* (see above n 32), Richard Vaughan cites *Die Berner-Chronik* by Schilling and *Die Strassburgische Chronik* by Trausch. See Vaughan, above n 2, 262 n 1. The author has not read the latter two, which are not widely available and kept in locations not currently accessible to the author. Of course, it is possible Barante relied on the manuscripts of Schilling or Trausch but this seems unlikely given that he cites neither in his treatise.

[224] Nerlinger, above n 43, 127 n 1. Some consider Knebel the sole source of reportage on the trial. John Foster Kirk refers to Knebel as '*the* chronicler'. Kirk, above n 42, 494 [emphasis added].

opening statement as follows: 'And after the tribunal was summoned, Heinrich Iselin . . . began to lay charges against Peter von Hagenbach . . . First, that in [1473], in [Thann], he caused four citizens . . . to be decapitated without tribunal or justice, *and so had acted against the law of the divine emperors*'.[225] Knebel has Iselin go on to say: 'Also, he had overwhelmed by force and against their will many married women, maidens, even nuns . . . and had done the same things *against God, justice, and all honesty*.'[226]

Thus, while Knebel's Iselin quotations allude to Hagenbach's acting 'against the law of the divine emperors' and 'against God, justice, and all honesty', with specific respect to the first and fourth counts of the indictment, they do not have Iselin generally charging Hagenbach with 'trampling under foot the laws of God and man'.

The discrepancies can perhaps be explained, though. First, according to Gabrielle Claerr-Stamm, Barante constructed his Hagenbach history, at least in part, relying on another old chronicle kept by a prominent architect of Strasbourg, Daniel Specklin.[227] Barante indicates in his book that Specklin's manuscript was compiled based on the contemporaneous accounts of a certain M. Golbéry, an official of the Alsatian city-state of Colmar.[228] Unfortunately, the portion of the Specklin chronicle dealing with Hagenbach (the entire year 1474, for that matter) was lost in a fire after the Strasbourg library holding it was shelled in 1870 by German troops during the Franco–Prussian war.[229] As a result, it is quite possible that Barante's rendering of the Iselin-opening derives from the missing portion of the Specklin manuscript (to which, for example, twentieth-century historian Heinrich Heimpel would not have had access).

There may be yet another simple explanation. Barante essentially acknowledged that he was only paraphrasing Iselin (qualifying his reporting of Iselin's words as 'approximate' or 'more or less'—*à peu près* in French). Given the admitted loose transcription, there is arguably enough consistent language in Knebel to reconcile

[225] Knebel, above n 81, 86 [emphasis added]. The original Latin reads: 'Et judicio bannito cepit Heinricus Ysenlin nomine domini Hermanni de Eptingen balivi contra dominum Petrum de Hagenbach querulare et quatuor articulos contra eum proposuit: [1] primo: quod anno preterito, videlicet 73, in Tannis quatuor cives, probos et honestos viros, absque judicio et justicia fecisset decapitari, unde *contra legem divorum imperatorum* fecisset.' Scott Farrington translated the Latin into English.

[226] Knebel, above n 81, 86–7 [emphasis added]. The Latin reads: 'Multas eciam in civitate Brisacensi mulieres maritatas, virgines, eciam moniales vi oppressisset et contra ipsarum voluntatem, et similia non solum ibi, verum eciam in multis aliis opidis et villis *fecisset contra deum, justiciam et omnem honestatem.'* As before, Scott Farrington translated the original Latin into English.

[227] Claerr-Stamm, above n 29, 186 ('Barante . . . relied on the chronicle of Daniel Specklin, which has disappeared').

[228] Barante, above n 40, vol 9, 405.

[229] Claerr-Stamm, above n 29, 186. See also Rodolphe Reuss, *Les Collectanées de Daniel Specklin, Chronique Strassbourgeoise du XVIème Siècle* (Strasbourg: Librairie J. Noiriel, 1890); Georges Delahache, 'La Cathédrale de Strasbourg: Notice Historique et Archéologique (1910)', *University of Toronto Libraries: Internet Archive* [website], <http://www.archive.org/stream/lacathdraledes00delauoft/lacathdraledes00delauoft_djvu.txt> (accessed 28 February 2013) ('Specklin left a manuscript that was partially destroyed in a fire of the city's library during the 1870 bombardment and that was published in retrievable fragments by Rod. Reuss') (translated by the author).

the slightly different language in Barante. In this regard, the notion that Barante was a less than careful historian is reinforced by an obvious mistake two sentences before the recounting of Iselin's opening statement. In particular, Barante introduced the section by informing readers that Sir Peter's trial took place on '4 May 1474'.[230] It is universally acknowledged that Sir Peter von Hagenbach was tried and executed on the *ninth* of May 1474, not the fourth. Ironically, given its future impact on the development of international criminal law, a potentially minor transcription error in a Burgundian side-plot may be the most significant legacy of Barante's mammoth ten-tome history of the Burgundian House of Valois![231]

Even if we can chalk up Barante's inadvertent proto-formulation of crimes against humanity (via Iselin) to a transcription error, Hagenbach was arguably guilty of our modern understanding of the offence all the same. The Rome Statute of the International Criminal Court defines crimes against humanity as a series of heinous acts, such as murder or rape, committed as 'part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.[232] As with war crimes, legal analysts could quibble about exactly when Hagenbach committed various acts of murder, rape and other crimes in relation to a widespread *or* systematic attack (or whether he had knowledge of the attack). But as most of the crimes charged at the Breisach Trial were committed in and around a period of hostility between Burgundy and the Alsatian polities, the requisite nexus between Hagenbach's individual transgressions and a widespread *or* systematic attack can likely be established.[233] Similarly, given that he was in charge of the forces engaging in the widespread or systematic attack, it is not a stretch to impute knowledge to him of any such attack.

[230] Barante, above n 40, vol 9, 14.

[231] Another possible source of the phraseology is suggested by historian Ruth Putnam. She explains that the anti-Burgundian alliance sent Emperor Frederick III a letter in August 1474 explaining why Sigismund had reasserted dominion over the mortgaged Alsatian territories. In particular, she recounts the letter informed the Emperor that Charles the Bold's 'appointed lieutenant had been peculiarly odious and had *broken the laws of God and men*' (Putnam, above n 198, 394 [emphasis added]). To support this, Putnam cites to page 442 of the 1902 treatise *Charles le Téméraire et la ligue de Constance* by French historian Émile Paul Toutey. But the cited language in French reads as follows: 'Il a inquiété gravement les prêtres, dans leurs corps et dans leurs biens, honteusement outragé des femmes et des filles, fait passer de vie à trépas beacoup d'innocents, *contre Dieu et le droit*, sans acun jugement.' Émile Paul Toutey, *Charles le Téméraire et la ligue de Constance* (Hachette, 1902) 442 [emphasis added]. The author translates this passage as follows: 'He seriously harassed the priests, with respect to both their persons and possessions, shamefully offended women and girls, and put to death many innocent persons, *against God and the law*, without judicial sanction.' Putnam's translation seems a stretch and the language quoted by Toutey is not even close to Barante's formulation of '*les lois de Dieu et des hommes*'. Even if Putnam's translation is accepted, it is quite possible that that letter's authors were merely quoting Iselin's words at trial.

[232] Rome Statute of the International Criminal Court, 2187 UNTS 3, opened for signature 17 July 1998 (entered into force on 1 July 2002), Art. 7.

[233] Given the widespread and systematic attack, Heimpel's assertion that the trial involved only garden variety charges of murder and rape is ill considered. See Heimpel, above n 5, 450.

(V) Conclusion

In illuminating the hidden history of the 1474 Breisach Trial, this chapter has attempted to identify and resolve certain vertical and horizontal dissonances in Hagenbach scholarship. With respect to the former, this has amounted to an exercise in historiographic and historical archaeology. The recent attention lavished on the case by ICL experts is informed by a cartoonish conception of the defendant—an ultra-violent, sexually depraved monster who ran amok for years along the Upper Rhine and terrorized its population. Consistent with that interpretation, the authorities who captured and tried him engaged in a righteous and visionary justice enterprise. They came out on the winning side of a Manichean struggle that gave birth to ICL and ennobled its pedigree.

Digging deeper, though, one finds a very different narrative developed initially by nineteenth-century historians and embraced by most of their twentieth-century confreres. They saw Hagenbach as a would-be administrative reformer whose efforts were thwarted by xenophobic subjects and a parsimonious superior. In trying to transform a fragmented archipelago of city-states into a cohesive governmental entity, Hagenbach was despised because he threatened an ingrained culture of seigneurial privilege and parochial complacency. In his efforts to redeem property put in hock by Sigismund, he likely reinforced views of Burgundy as excessively acquisitive and bent on conquest (this was exacerbated by Charles's own efforts to accede to the imperial throne). And in levying taxes to pay for good government, Hagenbach stoked local fears of financial servitude and ruin. But in doing the Duke's bidding, he did not have the Duke's support. So he was left to flounder, his undoing hastened by his admitted crass and prurient behaviour. They point out that his trial, a marketplace spectacle based on torture-extracted confessions, was little more than drumhead justice. It was akin to executing Charles the Bold in effigy. Peter von Hagenbach may not have been the most adroit governor and perhaps he did manifest contempt for the rising merchant and urban classes. But, the revisionists would contend, his final deserts were not just at all.

Digging deeper still, the bottom layer of historiography consists of the journalistic rough draft and the first generations of historians that followed. It is largely consistent with the modern ICL expert view but without the larger historical perspective and legal focus. And it is more regionally tinged and archaic. This layer is at once more reliable, given its comtemporaneity or relative proximity, and less reliable, given the inherent biases of its initial chroniclers and the disproportionate influence they exerted on sixteenth- to eighteenth-century historians.

But this piece has demonstrated that each layer is not necessarily inconsistent with the others. In fact, there are many points of convergence. And it is there that a unified, coherent narrative can be stitched together. Hagenbach *was* coarse and confrontational. But he was also hardworking and loyal and wanted to do right by his master. His entire career had been built on pleasing Charles the Bold. He undoubtedly meant to reform and upgrade the administration of his Alsatian fiefdom. And, consequently, resentment of the bailiff grew over the years as he pushed

while the Alsatians pulled. Hostilities boiled over in 1473 and matters came to a head in 1474. Charles's loyal lieutenant with a criminal past and odd sexual predilections felt increasingly boxed in and he eventually lashed out. The almost exclusive procedural focus of his defence at trial strongly supports accounts of the resulting crime spree.

It should also be noted that modern Hagenbach scholarship is characterized by a certain horizontal dissonance as well—between jurists and historians. Given the historical points of convergence just noted, however, these two schools ought to find common ground too. Certain views of the revisionist historians concerning the Hagenbach judicial proceedings are not without merit. The Breisach ad hoc tribunal may not have been a kangaroo court but it bears no resemblance to the comparatively well-oiled machine of modern international criminal justice administration. The defendant was hideously tortured for days before the trial. He was given no notice of the charges or allegations against him in advance of the hearing. He had no time to speak with a lawyer before standing in front of the judges. The proceeding itself was held on a market square in a circus atmosphere and concluded within a matter of hours. He was not able to call his most important (and only) witness to the stand—Charles the Bold. And there is no indication of a high burden of proof or that any such burden even rested with the prosecution. The Breisach Trial was certainly not the paragon of due process.

On the other hand, this was the late Middle Ages—centuries removed from our modern notions of due process. Torture was part of standard pre-trial procedure at that time. And the trial itself seems relatively fair for that era. Hagenbach was represented by a zealous advocate in Hans Irmy and he was given two additional lawyers of his choice. There is as well a flip side to the 'public spectacle' aspect of his trial—transparency. Hagenbach could have been summarily condemned in front of a secretive Star Chamber but his trial was held in public (and that was consistent with local custom). He was able to confront witnesses called against him. He had twenty-eight finders of fact (compared to twelve in the modern jury system). And Charles the Bold, his sole designated witness, was not allowed to testify because the defence of superior orders was rejected *ab initio*. As well, the proceedings lasted from early in the morning until late at night—which could equate to two or three modern court days. There seems to have been significant deliberation among the twenty-eight judges suggesting that a consensus was cobbled together after carefully sifting through the evidence. In an age of witch-hunts, trials by ordeal, the Star Chamber, and the Inquisition, this was an exceedingly fair trial.

And in many ways it seems inappropriate to use twenty-first century ICL terminology to analyse a fifteenth-century judicial proceeding. But if that terminology is used, this chapter has demonstrated that the Breisach Trial has many of the hallmarks of a modern international atrocity adjudication. As a threshold matter, regardless of anything else, it is the first recorded case in history to reject the defence of superior orders. In itself, that distinction invests the trial with universal historic importance in the development of atrocity law.

But has the Hagenbach inquest left a larger legacy? Is it the world's first international war crimes trial? Did it bequeath us the first primitive formulation of

crimes against humanity? As this chapter has demonstrated, given the relatively circumscribed writ of the Holy Roman Empire by the late fifteenth century, it is not unreasonable to classify the trial as 'international'. And Burgundy's hostile occupation of the Sundgau in the first part of 1474 means Hagenbach's transgressions may arguably be recognized in contemporary terminology as war crimes. Moreover, the bailiff's apparent widespread and systematic attack against the Alsatian civilian population (most clearly via rape and murder)—made with his commander's knowledge of the attack—seems to qualify as crimes against humanity as it is understood today.

Whether, on that fateful Monday morning in the spring of 1474, Heinrich Iselin spontaneously and intuitively attempted to vocalize the raw concept of a new kind of atrocity crime—offences violating 'the laws of God and man'—may never be known for sure and, in any event, is beside the point. Since the modern birth of international criminal law in 1945, experts have *perceived* that the Swiss procurator articulated a new juridical concept that morning—crimes against humanity. That perception has undoubtedly had an influence, however nuanced or attenuated, on the modern development of ICL. And it has lent the subtle sanction of ancient pedigree to jurists attempting to blaze new trails with respect to ICL theories of liability, defence, and procedure. This chapter has shown that though they might be grounded in inaccurate or superficial understandings of history, modern perceptions of the trial are at least not based on unsubstantiated myth. Perhaps this chapter will disabuse ICL of its one-dimensional portrait of Hagenbach as history's consummate bogeyman. But it should also enhance appreciation for the important semiotic and iconographic space the Breisach Trial now inhabits in transnational legal discourse.

The case did set an epochal precedent. Nothing in history leading up to that moment in 1474 would have suggested the remarkable course of action taken by Sigismund. It is tempting to see that decision as an historic anomaly that would not be repeated for centuries to come. But on closer inspection, Sigismund's choice to hold a trial before an international court fits well within the historical narrative of that era.

It was a time of religious and political disintegration. The Holy Roman Empire was fading into irrelevance and the Catholic Church was on the verge of losing its European hegemony. It was the eve of the nation-state—a unique moment when the old collective structures were dying and the new ones had yet to be born. Given the interstitial political turbulence, the time was ripe for a plural approach to law enforcement in the cosmopolitan geographic centre of Europe. Hagenbach's inter-regional depredations, which helped forge a rare pan-Germanic consensus, provided the perfect forum to experiment with international justice during that fragmented time. The Westphalian order, already on the horizon, would foreclose any such future experiments until Nazi brutality put a chink in the Westphalian armour and inspired an unprecedented transnational justice operation in the wake of a truly global war. In that sense, although on much different scales, Breisach and Nuremberg have much in common. And should the nation-state ever manage to reassert its absolute supremacy again, Breisach will undoubtedly be on the lips of future international jurists seeking, as before, to end impunity at the expense of sovereignty.

3

A Supranational Criminal Tribunal for the Colonial Era: The Franco-Siamese Mixed Court

Benjamin E. Brockman-Hawe[*]

(I) Introduction

The year 1892 was one of great change for the institution of French colonialism. The emergence of a French electorate preoccupied with colonial matters and sensitive to threats, real and perceived, to France's imperialistic pretensions[1] coincided with a rise in the political fortunes of the most opportunistic and demagogic members of the *parti colonial* to create an environment favorable to the adoption of aggressively expansionist policies and projects. The impetus towards expansion manifested early on as a breakdown in French-Siamese relations. When the British government announced in 1892 its intention to cede its territorial rights over the Southeast Asian statelet of Chieng-Keng to Siam, the decision was seized upon by the *parti* as evidence of an international conspiracy to expand England's regional influence at the expense of French Indochina. Championing a policy of forceful confrontation and military intervention, the *parti* successfully agitated for the dispatch of a 'police force' to occupy the easternmost territories of Siam.[2]

The French anticipated a quick and uncomplicated victory, but the campaign took an unexpected turn when *Inspecteur de la Garde Civile* Grosgurin died at the hands of Siamese troops at Kham Muon. Grosgurin's demise further whipped the *parti* and the French nation into a nationalistic frenzy, so much so that an

[*] This chapter is dedicated to my mother, Dr. Linda Brockman, who has always encouraged me to dig deeper.

[1] It was only after colonial problems were reframed as issues of inter-European competition that widespread public interest in colonial affairs was realized. C.M. Andrew and A.S. Kanya-Forstner, 'The French "Colonial Party": Its Composition, Aims and Influence, 1885–1914', *Historical Journal*, 14 (1971), 100.

[2] Patrick Tuck, *The French Wolf and the Siamese Lamb: The French Threat to Siamese Independence 1858–1907* (Bangkok: White Lotus 1995), 104. France first challenged Siam's suzerainty over the territories of Laos in 1867, when French negotiators insisted that all phrases that might be construed to imply their acceptance of Laos' tributary status be removed from a proposed treaty with Siam: 27–9.

Article specifically related to the incident was inserted into one of the two treaties that marked the end of hostilities between France and Siam. Pursuant to Article III of the Franco-Siamese Convention of October 1893:

> The authors of the assassination of [Kham Muon] shall be tried by the Siamese authorities. A representative of France shall be present at the trial and witness execution of the sentence pronounced. The French Government reserves the right to appreciate whether the punishment is sufficient and, where applicable, claim a new trial before a Mixed Court, whereof it shall determine the composition.

This provision was exceptional among colonial-era agreements; the establishment of a Mixed Court represented a radical departure from precedent, which favoured the trial of persons accused of crimes committed during military operations before the national courts 'of the belligerent in whose hands they [were]'.[3] How such an unusual article came to be included in an otherwise typical colonial-era agreement is discussed in greater detail in section II. Sections III and IV will describe the prosecutions of the 'author of the assassination', initially before a Siamese Special Court and later before the Article III Franco-Siamese Mixed Court. This chapter concludes with a discussion of the significance of the Mixed Court as an international criminal law phenomenon, including its role as a progenitor of contemporary ICL mechanisms and the substantive and procedural laws they apply.

(II) The Affair of Kham Muon and Negotiation of the Convention of 3 October 1893

Although France was relatively late to stake a claim in Southeast Asia, by 1885 it had established effective control over most of the territory comprising contemporary Vietnam and Cambodia. The French, however, remained covetous of the more lucrative trade routes thought to lie just beyond their grasp to the west, and in 1886 and 1889 sponsored missions into Laos, a Mekong River-straddling suzerain of Siam whose easternmost frontier delimited the border between French Indochina and Siam. The purpose of these incursions was two-fold: first, to legitimate French claims that the Mekong was the appropriate border between the two sovereigns by uncovering archival evidence that Laotian territories running along the east bank of the river rightfully belonged to states that were now French colonies; and second, to pave the way for a French commercial and political presence in the Mekong Valley by negotiating the withdrawal of Siamese garrisons along the east coast of the River.[4]

August Pavie, the leader of both missions and future French consul to Bangkok, failed to achieve either objective. The explorer unearthed so little evidence supportive

[3] Institute of International Law, Manual of the Laws of War on Land (adopted 9 September 1880), Part III (*Chapeau* and Article 84); James W. Garner, 'Punishment of Offenders Against the Laws and Customs of War', *American Journal of International Law*, 14 (1920), 76–9.

[4] Tuck, above n 2, 85–96.

of a theory of Vietnamese (and by extension French) possession that in his final report he recommended avoiding negotiations with Siam until his employers were prepared to answer competing territorial claims with force, and the Siamese effectively counteracted the commercial and political aspirations of the *Missions Pavie* by denying the eponymous leader permission to negotiate directly with civilian and military leaders living in the Mekong valley.[5] Frustration over these failures prompted the *parti* to contemplate more forceful means of compelling Siam into ceding the disputed Laotian territories to France. A suitable *casus belli* for the deployment of French troops to the disputed region was found in December 1892, when the English handed over control of the northern Mekong territory Chieng-Keng to Siam. The move convinced key colonialists that England had insidiously been encouraging the Siamese to reject French claims over eastern Laos all along, and the *parti* eventually convinced the French parliament to accept their plan for an immediate and forcible eviction of Siamese officials and troops from the Mekong's east bank.[6] After receiving the blessing of the Chamber of Deputies, the *parti* leadership wasted no time in dispatching armed columns of French and Annamite (Vietnamese) soldiers to the contested region, and by April 1893 French 'police forces' had established a toehold in Laos.[7]

Because the *parti* expected Siam to offer only a 'comic gesture of resistance'[8] it came as a considerable surprise when Captain Luce telegrammed Paris that the Siamese Commissioner of Kham Muon, Phra Yot, who had initially agreed to peacefully relinquish the contested territory and to leave for Outhene under the 'protection' of an armed escort led by M. Grosgurin, had in fact 'secretly sent for a band of 200 armed Siamese and Laotians[,] who surrounded . . . the house where [M. Grosgurin] was lying ill, and "assassinated [him] with a revolver" whilst the band massacred the escort'.[9] The *parti* immediately demanded full reparations for the 'act of treason', sent three men-of-war from Saigon to Bangkok and ordered the

[5] Tuck, above n 2, 89, 9–97.

[6] Archives d'Outre-Mer (AOM), Pavie to Ribot, 29 December 1892, No. 40 (referring to an earlier report by the Resident Superior of Hue suggesting that a 'de facto occupation . . . will lead promptly . . . to the withdrawal of Siamese troops' from the contested area). The parliament budgeted 180,000 francs for the operation: Tuck, above n 2.

[7] Foreign Office (FO) 881/6373, Inclosure 'Extract from *Le Matin* of 5 April 1893', Marquis of Dufferin to Rosebery, 5 April 1893, No. 44 (describing the French occupation of Stung Treng); FO 881/6373, Inclosure 'Extract from *Le Matin* of 10 April 1893' in Marquis of Dufferin to Rosebery, 5 April 1893, No. 48 (describing the French occupation of the Island of Khone). The French authorized a 'police action' specifically to avoid the appearance of waging an open war against Siam: Tuck, above n 2, 123.

[8] Archives du Ministre des Relations Exterieures (MRE), Asie-Indochine 83, Jules Harmand, 'report from Novembre 1892'. August Pavie was of the opinion that '[t]he Siamese government, seeing that it has exceeded the limits that our forbearance had seemed to authorize, will doubtless move from one extreme to the other as is generally the case with Asiatics': *Letter from Pavie to Le Myre,* 12 December 1893, 'The Escalation in Franco-Siamese Relations', *Auguste Pavie: The Barefoot Explorer*, <http://pavie.culture.fr/rubrique.php?rubrique_id=60&lg=en#ecran2> (accessed 3 March 2013).

[9] FO 881/6793, Inclosure 'Extract from *Le Matin* of 27 June 1893' in Phipps to Rosebery, 27 June 1893, No. 139. See also FO 881/6793, Inclosure 'Extracts from *L'Independant de Cochin-China*' of 16 June 1893 in Marquis of Dufferin to Rosebery, 25 July 1893, No. 146.

capture of the Gulf Islands in the Bay of Samit and Luang Prabang.[10] The Siamese, however, doubted the veracity of Luce's telegram, and refused to pay reparations unless and until additional reports confirmed that events had taken place in the manner described therein.[11]

News of Siam's temporizing in the face of Grosgurin's 'murder' remained on the front page of the major Parisian periodicals for over a month,[12] where it fed a wave of anti-Siamese sentiment that emboldened the *parti* to enlarge their territorial claims and agitate the remainder of the French political establishment into action.[13] On 20 July 1893 the French parliament communicated its first formal ultimatum to Siam, by which Bangkok was required to (1) relinquish all rights to the east bank of the Mekong; (2) pay an indemnity to the victims of various acts of Siamese aggression; and (3) punish the officers responsible for various attacks on French troops, including the Grosgurin attack. Failure to accept the terms of the ultimatum within forty-eight hours would result in a blockade of the Siamese capital.[14] The Chamber of Deputies also unanimously ratified the decision of Foreign Minister Jules Develle to send Charles Le Myre de Vilers, the parliamentary deputy for Cochinchina, to Bangkok, with instructions to negotiate a treaty that would guarantee French territorial rights along the Mekong River and secure compensation for Siam's various 'violations of *jus gentium*'.[15]

[10] Walter E.J. Tips, *Siam's Struggle for Survival; The Gunboat Incident at Paknam and the Franco-Siamese Treaty of October 1893* (Bangkok: White Lotus 2006), 65 (journal entry for 18 June 1893); AOM, Siam 3/46, Lanessan to Declasse, 11 June 1893, No. 95. M. Develle, the French Foreign Minister, warned the English Minister in Paris that he would 'present matters in their true light' to the Chamber of Deputies if Siam did not address France's grievances. Develle assured the English Minister that the Chamber would escalate the conflict by committing an additional 10,000,000 francs and 6,000 men for the operation, and authorizing military operations against Bangkok: FO 881/6479, Phipps to Rosebery, 30 June 1893, No. 6.

[11] Prince Devawongse, the Siamese Foreign Minister, protested to Pavie that:

> The event would have happened on the seventh, four days marching away from Kam Muon and it is starting from the ninth that the Annamites bring this news. The Siamese officer would have brought two hundred men from Outhene and . . . it appears that in Outhene there were only fifty men. The officer, who is Phra Yot, is moreover known as an honourable man and his whole character goes against this accusation of assassination.

Tips, above n 10, 64 (journal entry for 17 June 1893). Pavie, who knew Phra Yot from his time spent surveying Laos during the 1889 *Mission*, was reported to have had 'nothing bad to say' about the Siamese Commissioner at this meeting.

[12] See for example, 'Le Guet-Apens de Keng-Kien', *Le Figaro* (Paris, France), 17 June 1893; 'Au Siam', *Le Matin* (Paris, France), 17 July 1893; 'Le Question au Siam', *Le Matin* (Paris, France), 27 June 1893. Rolin-Jaequemyns confirmed that the incident produced 'great emotions in Paris'. Tips, above n 10, 65 (journal entry for 18 July 1893).

[13] FO 881/6479, Inclosure No. 1 'Extract from the *Temps* of 19 July 1893' in Phipps to Rosebery, 19 July 1893, No. 78. See generally Tuck, above n 2, 112.

[14] Ministre des Affaires Etrangères (MAE), Documents Diplomatique, Affaires du Siam, Develle to Pavie, 19 July 1893, No. 12. See also FO 881/6479, Phipps to Rosebery, 19 July 1893, No. 80; FO 881/6479, Rosebery to Jones, 20 July 1893, No. 88; Tips, above n 10, 97–8 (journal entry for 20 July 1893).

[15] Documents Diplomatique, above n 14, No. 1. See also No. 78 above n 13; FO 881/6479, Inclosure 'Extract from the *Journal Officiel* of 19 July 1893', in Phipps to Rosebery, 19 July 1893, No. 82.

Two days later Gustave Rolin-Jaequemyns, the Belgian General Advisor to the King of Siam, drafted and sent a qualified acceptance in which Siam (1) agreed to withdraw their military posts from the disputed territory within the month, but suggested that the dispute over ownership of the territory be submitted to international arbitration; (2) consented to paying the indemnity demanded, but proposed that a Joint Commission be established to investigate the French claims; (3) confirmed its readiness to deposit a 3,000,000-franc guarantee with the French, but emphasized that the Siamese counted on 'French justice' to restore to them any sum remaining after the 'equitable adjustment of all claims'; (4) assented to the punishment of any individuals 'responsible for personal attacks not in compliance with national and international law'; and (5) accepted responsibility for paying reparations to the families of the deceased 'in accordance with ordinary justice'.[16] Alas, the Siamese reply was considered 'insolent' and 'unsatisfactory' by Develle, and prompted the umbrageous French cabinet to escalate their demands once more.[17] After announcing the imposition of a blockade on 26 July 1893, the French sent a 'declaration' to supplement the terms of the ultimatum, *inter alia* obliging the Siamese to withdraw all troops located within twenty-five kilometres of the Cambodian border and accept the French occupation of Chattaboon.[18] The Siamese, fearful of losing additional territory, unconditionally acquiesced to the 'second Ultimatum' that same day.[19]

Le Myre's arrival in Bangkok on 16 August 1893 marked the beginning of the second phase of negotiations between France and Siam.[20] Although Develle had cautioned the Plenipotentiary to adopt 'an attitude of benevolence' during the

[16] FO 881/6479, Jones to Rosebery, 23 July 1893, No. 118; Tips, above n 10, 99 (journal entry for 21 July 1893). By this time French officials had deposed survivors of the events at Kieng Chek and their accounts forwarded to the Siamese. These records apparently confirmed that the French had 'grossly misinterpreted the circumstances' and that Grosgurin had been killed in the course of a 'regular battle' between French and Siamese forces: Tips, above n 10, 72 (journal entry for 26 June 1893). See also FO 881/6479, Jones to Rosebery, 10 July 1893, No. 19.

[17] FO 881/6479, Marquis of Dufferin to Rosebery, 26 July 1893, No. 158. The Marquis 'could not help thinking that there was something artificial in the indignation [Develle] expressed, not unlike that exhibited in a conversation on the banks of a stream between two individuals whose memory has been embalmed by a great fabulist'. Develle is reported to have stated that Siam's 'disrespectful hesitations and suggested modifications were intolerable when preferred by so insignificant a State to so great a Power as the Republic, and would fully justify France in now taking whatever military or other measures she might deem expedient': Cabinet Papers 34/34, Marquis of Dufferin to Rosebery, 27 July 1893, No. 41.

[18] Tips, above n 10, 105 (journal entry for 27 July 1893). See also MRE, Correspondence Politique des Consuls (CPC) Siam 16, Pavie to Develle, 23 July 1893, No. 93; FO 881/6479, Jones to Rosebery, 1 August 1893, No. 245.

[19] Documents Diplomatique, above n 14, Nos.19–21; Tips, above n 10, 111 (journal entry for 31 July 1893).

[20] When the French Plenipotentiary arrived in Siam, Rolin-Jaequemyns immediately sent a letter of introduction explaining his royal authorization to negotiate the terms of a treaty. Le Myre, however, had instructions to 'categorically…spurn the intervention of foreign advisers' and refused to negotiate with anyone other than Siamese officials. When Rolin-Jaequemyns learned of these instructions, and upon receiving no reply to his overtures to the French negotiator, he considered resigning from his post. Ultimately he elected to deny the French the 'pleasure' of seeing him leave the service of the King and continue advising Prince Devawongse (the Siamese Foreign Minister) behind the scenes: Documents Diplomatiques, above n 14, No. 1; Tips, above n 10, 136–137 (journal entry for 20 August 1893).

negotiations,[21] Le Myre made no secret of his intention to impose 'very harsh' measures on the Siamese, with whom he considered negotiating 'a waste of time'.[22] Indeed, the record of negotiations is rife with instances of Le Myre attempting to deceive, bully and frustrate the Siamese negotiator, Prince Devawongse, into surrendering more than the ultimatum had demanded.[23] For example, during their second meeting Le Myre requested that the Prince affix his signature to an unexamined copy of the proposed Treaty of Peace and Friendship 'as a matter of form'. When the Prince politely declined, Le Myre menacingly reminded him that the French warships stationed in the Gulf could make matters 'at any moment quickly change for the worse'.[24]

Le Myre's conduct was particularly egregious with respect to the settlement of what had come to be known as the Affair of Kham Muon. The French Plenipotentiary arrived in Siam determined to see Phra Yot brought before a predominantly French Franco-Siamese Mixed Court,[25] but with the exception of one presumptive and off-hand remark to Devawongse that the 'culprits' of the Affair of Kham Muon would 'of course' face a court composed of the 'competent Siamese authorities in conjunction with [French] Consul'[26] Le Myre refused to discuss the matter, preferring to hold it *in terrorem* over the Siamese.[27] The telegrams exchanged between Le Myre and Devawongse tell their own story: throughout September 1893 the French Plenipotentiary constantly protested that Siam had failed to fulfil its obligation to punish 'guilty parties' involved in the Kham Muon incident, and demanded that Siam grant additional concessions as a consequence,[28] even as Devawongse affirmed Siam's willingness to bring the individuals the French considered guilty before an

[21] MRE, MD Asie-Indochine 87, Develle to Le Myre, 5 August 1893. No. 5.

[22] MRE, CPC Siam 16, Le Myre to Develle, 24 August 1893 (Le Myre believed that 'European diplomatic niceties are inappropriate in Siam. With Asiatics, you impose your will when you are the stronger, or you stand aloof if you are the weaker.'). See also MRE, MD, Asie-Indochine 87, Le Myre to Develle, 3 August 1893.

[23] FO 881/6479, Inclosure 'Statement of Circumstances and Proceedings Connected with M. Le Myre de Vilers' Special Mission to Bangkok', in Jones to Rosebery, 25 August 1893, No. 423; FO 881/6479, Inclosure 'Second Meeting of the Conference for the New Treaty of Peace and Friendship', in Jones to Rosebery, 13 September 1893, No. 454. See also 'France Not Yet Satisfied—New Demands Daily Forced Upon the Siamese', *New York Times* (New York, USA), 30 August 1893.

[24] No. 423, above n 23. See also Tips, above n 10, 141 (journal entry for 24 August 1893). Rolin-Jaequemyns writes in his journal of a letter sent by Le Myre to Devawongse that is 'unusually insolent, [and] written in a mocking tone which would be sufficient, in an ordinary negotiation, to justify a breaking off'. Neither the Belgian nor French archives hold a copy of this letter. Tips, above n 10, 157 (journal entry for 18 September 1893).

[25] A telegram from Le Myre to Develle from 21 August 1893, drafted three full days before his arrival in Siam, contains the earliest draft of what would eventually become Article III of the Convention. AOM, Siam 4/51, Le Myre to Develle, Draft of the proposed terms of a Franco-Siamese Convention, 21 August 1893, No. 12. Develle initially attempted to persuade Le Myre to reduce Article III to a right to demand a retrial before a Siamese court, but later capitulated and agreed to allow Le Myre 'to be the judge' of how best to handle the matter: AOM, Siam 4/51, Develle to Le Myre, 23 August 1893; AOM, Siam 4/51, Develle to Le Myre, 25 August 1893.

[26] No. 454, above n 23. There is nothing in the minutes to indicate that Devawongse even heard this stray remark.

[27] FO 881/6479, Jones to Rosebery, 14 September 1893, No. 411.

[28] FO 881/6479, Inclosure No. 1 'Le Myre de Vilers to Prince Devawongse', in Jones to Rosebery, 13 September 1893, No. 453. See also FO 881/6479, Inclosure No. 2 'Le Myre de Vilers to Prince Devawongse' in, Jones to Rosebery, 26 September 1893, No. 494.

impartial domestic court, pending confirmation from the Plenipotentiary that this would satisfy France.[29]

The question of Phra Yot's fate came to a head on 29 September 1893, when Le Myre handed Devawongse a draft Treaty and draft Convention, the latter incorporating his as yet unseen proposal for a trial of Phra Yot before a Mixed Franco-Siamese Court (Article III), and announced his intention to leave for Saigon with or without an agreement within four days. Rolin-Jaequemyns spent the evening reviewing the terms of the proposed Convention and, finding himself in agreement with Devawongse that Article III was 'completely unacceptable', immediately began work on a *note verbal* summarizing Siam's objections.[30] In the note, which was delivered to Le Myre on 31 September 1893, Rolin-Jaequemyns protested that 'the Siamese government do not think that it is in their power to violate by a retroactive disposition the individual right, recognized by Treaties, of any of their subjects to be judged by a competent Court of their own nation'.[31]

On 1 October 1893, the two Plenipotentiaries commenced a final round of negotiations. Le Myre flatly refused to alter the language of the Convention itself, but agreed to address Siamese concerns over Article III in a *proces-verbal* to be appended to the Convention.[32] He also insinuated that a rejection of the draft Treaty and the unmodified draft Convention would incite the French to authorize additional attacks against Siam.[33] Facing a 'third Ultimatum',[34] mindful of the inferiority of Siam's armed forces, and exhausted by months of French cavilling, deception and abuse,[35] the Prince finally capitulated and signed the Treaty and Convention,

[29] No. 453, Inclosure No. 2 'Prince Devawongse to Le Myre de Vilers', above n 28. See also No. 494, Inclosure No. 3 'Prince Devawongse to Le Myre de Vilers', above n 28.

[30] Tips, above n 10, 168 (journal entry for 1 October 1893). Captain Henry Jones, British Minister in Bangkok, agreed that 'the demands of Article III are in violation of all reason and justice': FO 881/6479, Jones to Rosebery, 12 October 1893, No. 516.

[31] MAE, Siam 16, Enclosure No. 1 'Note Verbal sur le Convention', in Le Myre to Develle, 4 October 1893, No. 110. Rolin-Jaequemyns' citation to 'treaties' was probably a reference to the Treaty of Friendship, Commerce and Navigation between France and Siam, which in Article 9 provided that if 'a Siamese commit any crime or offence against Frenchmen, he shall be arrested by the Siamese authorities, and punished according to the laws of the country': Siam Government, State Papers of the Kingdom of Siam, 1664–1886, Compiled by the Siamese Legation in Paris (William Ridgeway, 1886), 43, available in the General Archives of the Kingdom of Belgium, Papiers du Gustave Rolin-Jaequemyns, dossier 1, T-423-1.

[32] In the *proces-verbal* Le Myre responded to Rolin-Jaequemyn's objections by noting that 'foreign jurisdiction is already recognised in Siam, and . . . Mixed Courts already exist': FO 881/6479, Jones to Rosebery, 2 October 1893, No. 432.

[33] Although it appears that no record was kept of this final meeting between the French and Siamese negotiators, Devawongse later told Rolin-Jaequemyns that threats of renewed violence had compelled him to sign the Treaty and Convention: Tips, above n 10, 167 (journal entry for 1 October 1893). James G. Scott, Captain Jones' successor, confirms that Le Myre 'threatened to leave if he did not obtain the Prince's signatures; he actually went through the theatrical performance of keeping up steam on the board the *Aspic* and putting his baggage into the innards of that gunboat at the French Legation steps': FO 881/6586, Scott to Rosebery, 28 January 1894, No. 44.

[34] Tips, above n 10, 167 (journal entry for 1 October 1893).

[35] Even Develle agreed that Le Myre de Vilers had conducted himself in a reprehensible manner throughout the negotiations. In personal letters Develle described Le Myre de Vilers as 'an idiot who almost jeopardised everything', remarked that Le Myre's demands were 'violent, brutal and excessive', and complained that Le Myre's draft treaties, 'formulated in a pretty dishonest manner, . . . actually

thereby committing Siam to trying Phra Yot before a domestic court and, at the discretion of the French, before a Mixed Court as well.

Rolin-Jaequemyns was furious at Devawongse's 'act of inconceivable weakness' and drafted a letter to Le Myre 'highlight[ing] the gaps' of Article III.[36] In his last-ditch effort to alter the Convention language, Rolin-Jaequemyns characterized Article III's inclusion in the signed Convention as a 'common oversight', suggested extricating the Article from the Convention before news of the agreement was publicized, and reiterated the concerns of his letter of 31 September 1893, adding that:

> [I]f there is some sort of mixed jurisdiction in civil cases where both parties belong to different nationalities, there is none at all in criminal cases… It would thus be a serious infringement on individual rights to create a Mixed Court for the trial of past crimes or offences, infringement all the graver if the composition of the Court depends upon a State to which the accused do not belong.[37]

Le Myre again declined to remove the controversial provision, arguing that Rolin-Jaequemyn's 'reasoning [was] based on an incomplete draft of the Convention',[38] and on 3 October 1893 the Siamese government publicly acknowledged their acceptance of the unmodified Treaty and Convention.[39]

(III) Phra Yot's Trial before a National Tribunal

(1) Designing the Special and Temporary Court

The Siamese were understandably sceptical that anything other than a guilty verdict coupled with a harsh sentence would mollify France. In a final effort to avoid the humiliation of having a Siamese subject who had resisted France be brought before French judges, in January 1894 the Siamese sent a telegram to Pavie proposing the creation of a 'Mixed International Court' presided over by neutral American and Dutch consular officials and an English Law Officer from Singapore.[40] A trial before such a court, the Siamese argued, would provide the French government and

destroyed our text': Les Archives de la Sarthe (ADS), Fonds Paul d'Estournelles de Constant, 12 J 119, Develle to d'Estournelles de Constant, 9 October 1893; MRE, MD Asie-Indochine 87, Develle to Paul Revoil, undated.

[36] Tips, above n 10, 168–9 (journal entries for 1 October 1893 and 2 October 1893).

[37] FO 881/6479, Inclosure 'Prince Devawongse to M. Le Myre de Vilers' in Jones to Rosebery, 15 October 1893, No. 552. See also MAE, Siam 16, Enclosure No. 2 'Letter from Prince Devawongse to Le Myre de Vilers', in Le Myre to Develle, 4 October 1893, No. 110. Rolin-Jaequemyns did not expect that the French would completely expunge Article III from the Convention, but had hoped to 'obtain some attenuation, during the time which precede[d] the ratification of the treaty': Tips, above n 10, 169 (journal entry for 2 October 1893).

[38] MAE, Siam 16, Le Myre to Develle, 4 October 1893, No. 110. Rolin-Jaequemyns confirmed that 'de Vilers [had] not wanted to hear anything about our objections': Tips, above n 10, 170 (journal entry for 3 October 1893).

[39] The full text of the Treaty, Convention, and *proces-verbal* are available at FO 881/6479, Inclosures No. 1–3 in Jones to Rosebery, 12 October 1893, No. 516, and on the website of the MAE at <https://pastel.diplomatie.gouv.fr/choiseul/> (accessed 14 May 2013).

[40] FO 881/6586, 'Prince Devawongse to M. Pavie', in Scott to Kimberley, 19 March 1894, No. 78.

the European public with 'guarantees of impartiality' beyond those of a national court.[41] But Pavie was intransigent, and dismissed the suggestion as contrary to the terms of the Convention,[42] leaving the despondent Siamese with no alternative but to sign into law a Royal Decree creating a 'Special and Temporary Court' to try Phra Yot.[43]

Despite the virtual certainty that Phra Yot would end up before French judges, the Siamese went to considerable effort to design a domestic court that, under different circumstances, might have brought the Affair of Kham Muon to a mutually satisfactory resolution.[44] The Court applied existing Siamese legal codes but operated according to procedural rules inspired by the laws of England and France.[45] Special Court proceedings were adversarial in nature but presided over by six judges and one Chief Justice with broad powers to summon foreign subjects, compel Siamese subjects to give evidence or produce documents, and generally to 'take proper measures to enlighten the conscience of the Court and to remove from the proceedings all causes which appear of a nature to prolong it'.[46] The accused had the right to the assistance of one or more counsel, as well as the right to provide a full answer to the charges, to cross-examine any prosecution witness, to produce witnesses and evidence in his defence, and to have 'the last word' in Court.[47] He was also entitled

[41] FO 17/1220, Prince Bidyalath to Prince Svasti, received 5 February 1894, 52. See also 'Prince Devawongse to M. Pavie', n 40 above..

[42] The *Siam Free Press*, whose editor and correspondents were partial to the French position, was no doubt conveying the thoughts of the French Representatives when it published the opinion that '[o]nly the most sanguine, obstinate, and deluded of persons could put any trust in an "International Court" or arbitration': No. 78, above n 40, Inclosure No. 9 'Extract from *Siam Free Press* of 2 March 1894'. That the *Siam Free Press* was little more than a mouthpiece of the French legation is confirmed by an interview with M. Byrois, a correspondent with the *Press*, who in 1894 described M. Lillie (the editor of the his paper) as a 'devoted friend of France' and provided examples of instances in which Le Myre rewrote his articles to make them more 'vigorous and aggressive': FO 17/1221, 'Extract from *La Patrie*', in Dufferin to Rosebery, 15 April 1894, page 243, No. 148. See also FO 881/6586, Scott to Rosebery, 18 February 1894, No. 54.

[43] No. 78, above n 40. Scott felt that '[t]he refusal of the French Representatives to entertain the idea of a Mixed International Court forced the conclusion that from the beginning they had no intention of accepting the decision of the Siamese Court, and that finality of decision was the last thing they desired. The literal fulfilment of this suspicion still further dismays the Siamese'. Rolin-Jaequemyns, the primary author of the Royal Decree, initially conceived of a trial for Phra Yot before a Siamese court-martial, but for unknown reasons abandoned that idea in favour of a trial before a regular criminal court: Tips, above n 10, 164 (journal entry for 25 September 1893). See also No. 54, above n 42.

[44] Tips, above n 10, 211.

[45] The Siamese and English considered the Special Court to be more French than English. Devawongse felt that the Court applied 'very nearly same law of France' and Scott reported that the procedural rules were 'very much more founded on French than on English forms of law, and is certainly not too favourable to the accused': No. 54, above n 42; FO 17/1220, Prince Devawongse to Prince Svasti, 15 February 1894, 147. M Pavie, however, would later ascribe the (perceived) sluggishness of the proceedings as 'entirely [due] to English procedure': India Office Archives, MSS F278, George Scott's Diary (11), entry for 28 February 1894, 24. The *Siam Free Press* derided the Siamese for binding the Special Court to a 'mongrel procedure': No. 78, above n 40, Inclosure No. 9 'Extract from the *Siam Free Press* of March 2, 1894'.

[46] Rule 16, 17, 22 of the Royal Decree Instituting a Special and Temporary Court for the trial of the affairs of Tong-Xieng-Kham and Keng-Chek (Kham-Muon), in *Full Report, With Documentary Appendices, of the Phra Yot Trial Before the Special Court at Bangkok*, *Bangkok Times* (Bangkok, 1894).

[47] Royal Decree, above n 46, rules 10 and 21.

to a translated copy of any evidence brought against him in a language he did not understand.[48] The Court was obliged to work without interruptions other 'than those which [were] necessary for the ordinary wants of life' and to deliver a judgment within twenty-four hours of the conclusion of the closing arguments.[49] The Royal Decree also authorized a representative designated by the French government to confer with the Siamese prosecutor as to the content of the indictment, request that a particular witness be heard, cross-examine a defence witness and offer 'remarks' to the prosecution concerning the content of their closing arguments.[50]

(2) The culture of the courtroom

Dr John MacGregor, an English Officer in the employ of the Indian Medical Service, happened to be passing through Siam for the commencement of Phra Yot's trial on 24 February 1894. He captured the occasion in his memoirs:

> The court-room, where the case was tried, was in one of the large public buildings within the enclosure of the walled city; and it was only a comparatively small room, though honoured with so great a trial. On the elevated dais sat the six Siamese judges, in the centre of whom sat and presided HRH Prince Bitchit. To the right hand of the court and below the dais sat the French advocate, the French consul, and a French legal expert, who had come all the way from Saigon to watch the case. To the left of the court and facing the French party sat the defending pleaders, consisting of an English and a Cingalese lawyer, while the Crown Prince's ex-tutor acted the part of interpreter, in preference to coming with me through the wilds of Siam. Immediately in front and behind the judges was the Recorder's table, with three or four people sitting at it; and this party seemed to me to act the part of a 'buffer state' between the other two parties, and thus prevented a fresh collision on the floor of the court house.
>
> Last, but not least, there sat in front of the Recorder's table no less a personage than Phra Yott [sic] himself, who was being tried for his life for all these crimes mentioned above, and who was the immediate cause of all this hullaballoo, the echoes of which have not yet quite died away. It is needless to say that he was the observed of all observers. He was dressed in a blue coat and waistcoat, and a skirt that bore some distant resemblance to a kilt, but folded up behind in Siamese fashion, while on his feet he wore the daintiest little pair of pumps, and the long white stockings, reaching above the knee, which are so very much affected at the present time by the real Pink-'uns of Siam.[51]

After a preliminary objection to the presence of a key prosecution witness in the court room during open session (sustained) and a request that the trial be adjourned for ten days to allow the defence team additional time to prepare (overruled), the court recorder read out the *acte d'information*.[52] Phra Yot had been charged with ordering the wilful and premeditated murder of Grosgurin and an unknown

[48] Royal Decree, above n 46, rule 15.

[49] Royal Decree, above n 46, rule 23. According to Scott's report, this rule was inserted upon the suggestion of the French: No. 54, above n 42.

[50] Royal Decree, above n 46, rules 7, 11, 14 and 21.

[51] John MacGregor, *Through the Buffer State: A Record of Recent Travels Through Borneo, Siam, and Cambodia* (London: F.V. White, 1896), 100.

[52] 'The Trial of Phra Yot—First Day' in *Full Report*, above n 46, 1.

number of Annamite soldiers, robbery, arson, and the infliction of severe wounds or bodily harm on Boon Chan, Grosgurin's Cambodian interpreter, and Nguen van Khan, an Annamite soldier hospitalized as a result of wounds inflicted by the Siamese at Kieng Chek.[53]

Despite the gravity of the accusations levelled against him and the severity of the punishments he potentially faced,[54] Phra Yot displayed perfect sangfroid during the reading, a reaction that made quite an impression on the audience. The *Bangkok Times* correspondent covering the trial noted Phra Yot's 'considerable resource and self control',[55] James G. Scott, British chargé to Bangkok, wrote in his personal journal of Phra Yot's 'peaceful' presence,[56] and Dr MacGregor effervesced that:

> [The Accused] was as cool as the proverbial cucumber, chewing his betel all the while with appreciative gusto. He did not appear bloodthirsty or ferocious in any way, and had nothing in his appearance to distinguish him either as a felon or a hero. After the usual preliminaries had been gone through, and after Phra Yott [sic] had pleaded 'not guilty' to the series of charges laid against him, he left the Recorder's table, and went to sit beside his counsel to the left of the court, and still under the guard of a Siamese soldier, who always stood behind him.
>
> By this time he had got tired of chewing his betel-nut, and so he calmly took out of his pocket a great big cheroot, and commenced to smoke it there and then! The scene would strike any European with surprise, if unacquainted with the ways and manners of Eastern nations—to see the prisoner, tried for his life, and yet pulling away at his cheroot in the open court, as if the results of the trial were a matter of mere indifference to him. Most Europeans would have their throats a little too dry for smoking under the circumstances, and I should have liked very much to have possessed the brush of a ready artist, to depict the scene which I am now trying to describe with the more humble material of a scribbling pen.[57]

The attitude and conduct of the two French Representatives (M. Pavie and M. Ducos, President of the Court of Appeal in Saigon) left an equally indelible impression on those who attended the trial. In his official account of the proceedings for the Foreign Office, Scott took care to report that the representatives 'scoffed openly at the whole proceedings, habitually came late, knowing that . . . by the terms of the Convention . . . the Court could not sit without them, and did not hesitate to repeat daily that the trial was a mere waste of time, because the case must of necessity be tried again before a French Court'.[58] Comparing the 'high handed' behaviour of the representatives to that of Le Myre de Vilers, Scott also informed the British Foreign Office that Ducos, who had worked with the Siamese

[53] FO 17/1222, *Acte d'Information*, pages 95–6.

[54] Phra Yot could be sentenced to death, mutilation, lashing and imprisonment, condemned to cut grass for elephants or fined: *Acte d'Information*, above n 53.

[55] 'The Trial of Phra Yot—First Day' in *Full Report*, above n 46, 1.

[56] Scott Diary, above n 45, 24 (journal entry for 26 February 1894).

[57] MacGregor, *Buffer State*, above n 51. The accused was not the only smoker in court. One correspondent reported 'the judges, counsel . . . witnesses, policemen, and spectators, all sit smoking cigarettes and cigars'. Apparently tea was 'handed round occasionally' as well: 'A Trial in Siam', *Lancaster Gazette* (Lancaster, England) 14 April 1894.

[58] No. 78, above n 40. Scott also reported that Ducos dismissed the Special Court as a 'useless formality' and a 'farcical waste' to the *Siam Free Press*: No. 78, above n 40. See also No. 54, above n 42.

prosecutors to 'frame [the *acte d'information*] in accordance with his ideas'[59] and drafted what would become rules 22 and 23 of the Royal Decree,[60] and Pavie, who had consented to the Royal Decree and declined to object to the appointment of the Siamese judges,[61] had both subsequently refused to publicly acknowledge their role in the development of the Court.

(3) Phra Yot's vindication by the Special Court

The representatives doubtlessly anticipated that, by their belligerence and mendacity, they could disrupt the trial proceedings and frustrate Siamese efforts to legitimize the Special Court in the eyes of the European public. Although Pavie and Ducos achieved some success in accomplishing the latter, they utterly failed to bring about the former. In fact the Justices, drawing on the testimonies of the single prosecution witness (Boon Chan) and seven defence witnesses (including Phra Yot) that were heard over eight days of public session, impressively managed to pull together the first complete and convincing narrative of the events leading to the affray at Kieng Chek.

According to the Court's exonerating verdict of 17 March 1894, in mid-May 1893 an armed column of French and Annamite soldiers commanded by Captain Luce was dispatched to Kham Muon with orders to depose the Siamese Commissioner of the province. The Commissioner (Phra Yot) resisted the French for several days, but on 23 May 1893 submitted under protest and agreed to be escorted to Kieng Chek, in Outhene, by a small contingent of Annamite troops under the command of Inspector Grosgurin. Phra Yot's protests were recorded in a letter addressed to Captain Luce, in which the deposed Commissioner insisted upon Siam's 'continued absolute rights' over the territory, committed Kham Muon 'to the care' of the French until such time as he 'received any instructions', whereupon he would 'arrange the measures to be taken subsequently', and required that the letter be forwarded to the Siamese government 'so that the matter may be examined into, and a decision may be arrived at'.[62] Phra Yot then surreptitiously sent a second letter to the nearby

[59] No. 54, above n 42; No. 78, above n 40.

[60] No. 54, above n 42. The only evidence that Ducos contributed to the development of the Siamese Court in this manner comes from Scott's reports to the Foreign Office.

[61] No. 54, above n 42. In letters to Siam's plenipotentiary in Europe, Devawongse purported to have 'consulted the French minister on every step: as to how the Court shall be constituted, and as to who shall be the judges of the court': FO 17/1220, Prince Devawongse to Prince Svasti, 1 March 1894, 41. See also Prince Devawongse to Prince Svasti, 15 February 1894, above n 45, wherein Prince Devawongse explained that the President of the Court would be 'Prince Bichit, with the regulations for the proceeding which [the French Minister] agreed'. Despite his involvement, Pavie 'refused to recognise the Tribunal': 'Colonial Affairs', *Le Temps* (Paris, France) 17 April 1894. Pavie also reneged on a promise that he would provide the Siamese with a 'description of the charges' that should be brought against Phra Yot, and delayed the start date of the proceedings by failing to act on Siam's pre-trial requests for evidence in a timely manner: Prince Devawongse to Prince Svasti, 1 March 1894, above n 61. See generally Prince Bidyalath to Prince Svasti, above n 42; FO 17/1220, Scott to Rosebery, 26 February 1894, No. 61.

[62] Letter reproduced in 'The Trial of Phra Yot—Tenth Day' in *Full Report*, above n 46, 35–6.

Commissioner of Outhene, Luang Vichit, in which he appealed for assistance, in the form of men and arms, in overcoming his French escort.[63]

When the convoy reached Kieng Chek Inspector Grosgurin was informed that Phra Yot's second in command, Luang Anurak, had been seen publicly advocating armed resistance against the French. Luang Anurak was promptly arrested and taken to Grosgurin's house, where he remained in custody. Phra Yot, anxious that he would face a similar 'act of violence', secretly set out for nearby Wieng Krasene that evening. Along the way he met troop commanders Nai Tooi and Nai Plaak, who had been ordered by the Commissioner of Outhene to take fifty troops and, with the cooperation of forces from Kham Muon, secure Phra Yot and eject the foreign soldiers from the country.[64]

On 3 June 1893 Phra Yot, Nai Tooi and Nai Plaak led approximately twenty Siamese soldiers to Grosgurin's residence in Kieng Chek. As they communicated their demands to the Inspector, who was in poor health, Luang Anurak ran out of the house, prompting the Annamite soldiers to fire upon the Siamese. Nai Tooi, Nai Plaak and Phra Yot held a brief consultation and jointly issued an order to return fire. Inspector Grosgurin, approximately twelve Annamite soldiers, six Siamese soldiers and one Siamese translator were killed during this exchange.[65]

The Justices unanimously absolved the accused of all direct or indirect responsibility for Grosgurin's death, Boon Chan's and Nguen van Khan's wounds, the thefts and the house fire.[66] In a poorly organized but otherwise insightful and compelling opinion the Justices explained that Phra Yot was not in command of the Siamese soldiers that had fired upon the French and Annamite forces:

> It is true that the accused had a higher position in the permanent service than the two officers; but his authority extended only to the districts of Kham Kurt and Khammuon [sic]. If the accused had acted like this when he first met M. Luce he would have born the whole responsibility; but it was otherwise when the accused allowed the Annamite soldiers to drive him out of the stockade and to escort him to the frontier. Even if he could get away from the authority of M. Grosgurin he could only consider himself under the orders of other people, namely, in this case, of Nai Tooi and Nai Plaak. These, again, were acting under the order of Luang Vichit Sarasate, who was the civil and military Commissioner at Tar Outhene and Kammoun…The accused could only be considered as a councillor, as the soldiers were under the command of the two officers…Even, therefore, if the accused should have given such orders, the only orders, which could be obeyed, were the orders given by the officers.[67]

The Justices also addressed the prosecutor's allegation, not mentioned in the *acte d'information* but developed during their closing arguments, that Phra Yot had, by his letter to Captain Luce of 23 May 1893, 'implicitly engaged himself not

[63] Copy of letter reproduced in 'The Trial of Phra Yot—Ninth Day' in *Full Report*, above n 46, 34.
[64] Copy of orders reproduced in 'The Trial of Phra Yot—Ninth Day' in *Full Report*, above n 46, 34.
[65] 'The Trial of Phra Yot—Fourteenth Day' in *Full Report*, above n 46, 57–61.
[66] 'The Trial of Phra Yot—Fourteenth Day' in *Full Report*, above n 46, 59–61.
[67] 'The Trial of Phra Yot—Fourteenth Day' in *Full Report*, above n 46, 60.

to commit any act of hostility against the French'.[68] The Justices rejected this interpretation, stating that:

> [I]f Counsel for the Prosecution maintains that [the letter] is a handing over according to Treaty, and that [Kham Muon] could not be recovered by force of arms, they have wrongly interpreted those words. We must understand the letter to mean that the accused expressed his unwillingness to accede to the request of the French, and that he would take measures to recover when occasion offered. The letter cannot be considered as binding as a Treaty, as Phra Yot had no right to act in this matter for his Government.[69]

The Justices further adduced in dicta that the accused had been acting pursuant to the orders of a superior, and was therefore absolved of any legal responsibility:

> The soldiers who were examined in Court stated that they acted according to the orders of the officers. Even, however, if the accused had to share the responsibility with the two officers it can only be said that he acted under the orders of [Luang Vichit] . . . For the affray itself no individual responsibility exists.[70]

Finally, in one of the more abstruse sections of the judgment, the Justices suggested that Phra Yot's issuance of the order to fire was excused as a matter of self-defence or duress, and was a reasonable response to the danger faced by the Siamese forces. Thus:

> When the officers saw that several Siamese had fallen it became the duty of the soldiers to resist. They soon saw, however, that whether they offered resistance or not they had to die, and therefore the fire was returned. The Siamese soldiers were far more numerous than the opposing party and the result was what might have been expected. The fault does not lie with the accused or his men. We are, therefore, unanimously of the opinion that the act of the accused, and the two officers was done in strict execution of their duty.[71]

The Justices did not explicitly address the defence submission that the law of war applied to the affray between France and Siam in Kieng Chek, and that Phra Yot had acted entirely consistent with his obligations under international law.[72] The reluctance of the Justices to rule on this issue is understandable. The French had maintained that its engagements with Siamese forces and incursions into disputed territories had not amounted to declarations of war,[73] and a ruling by a Siamese court to the contrary would have endangered the fragile *détente* that had prevailed between the two powers since October 1893. However, there is little doubt that, had the political stakes been lower, the Justices would have resolved this question in favour of the accused; throughout the judgment the Justices repeatedly referred to French and Annamite forces as 'armed invaders' and the 'attacking party'.[74]

[68] 'The Trial of Phra Yot—Tenth Day' in *Full Report*, above n 46, 37.
[69] 'The Trial of Phra Yot—Fourteenth Day' in *Full Report*, above n 46, 61.
[70] 'The Trial of Phra Yot—Fourteenth Day' in *Full Report*, above n 46, 60.
[71] 'The Trial of Phra Yot—Fourteenth Day' in *Full Report*, above n 46, 60.
[72] 'The Trial of Phra Yot—Eleventh Day' in *Full Report*, above n 46, 50–1.
[73] See discussion section V(1) below.
[74] 'The Trial of Phra Yot—Fourteenth Day' in *Full Report*, above n 46, 60–1.

(IV) Phra Yot's Trial before the Franco-Siamese Mixed Court

Public opinion on the Special Court's verdict was split along predictable lines. The non-French expatriate community in Siam and the Siamese regarded Phra Yot's exoneration as reasonable and the Special Court proceedings as fundamentally fair,[75] while the French in Paris and Bangkok perceived the decision as inevitable and a blow to 'all who were hoping that the Franco-Siamese Agreement would lead to just satisfaction'.[76] In an interview published in *Le Matin*, Le Myre explained that he was 'not at all surprised' at the verdict given his familiarity with 'the Asian temperament and their approach to interpreting Treaties', and pledged that the 'blatant efforts of the Siamese Government to support its officials will run afoul of our firm commitment to demanding just satisfaction'.[77] One high-profile French official who wished to remain anonymous declared to a correspondent from the *Éclair* that an 'ordinary conviction' would have caused him the 'deepest amazement', and promised that Phra Yot would be convicted by a mixed tribunal on the basis of 'arguments and a surfeit of evidence that will humiliate and shame Siam'.[78]

(1) The jurisdiction and rules of the Mixed Court

Ducos made known his intention to constitute the Article III tribunal one day after the Special Court handed down its decision, and on 26 May 1894 the French and Siamese 'mutually consented' to rules of procedure that established a mixed court with jurisdiction over the Kham Muon affair.[79] The Mixed Court was to be

[75] 'The Trouble in Siam', *Ashburton Guardian* (Ashburton, New Zealand) 22 March 1894; 'Phra Yot's Case', *Daily Advertiser* (Singapore) 20 June 1894; 'The Phra Yot Trial', *Daily Advertiser*, 4 April 1894 (Singapore) Page 3. According to Henry Norman, an English journalist, '[Prince Bijit's] special talents made him the only possible man to occupy the very difficult post of Presiding Judge at the recent State Trial of Pra Yot [sic]. Throughout the prolonged proceedings his conduct was such as to win him the highest praise from all the Europeans who were present': Henry Norman, *The Peoples and Politics of the Far East: Travels and Studies in the British, French, Spanish and Portuguese Colonies, Siberia, China, Japan, Korea, Siam and Malaya* (London: T. Fischer Unwin, 1895), 450.

[76] FO 881/6586, Inclosure 'Extracts from the *Matin* of 18 and 19 March 1894', in Phipps to Rosebery, 19 March 1894, No. 53. See also FO 881/6586, Inclosure 'Extracts of the *Éclair* of 3 April 1894', in Marquis of Dufferin to Kimberley, 2 April 1894, No. 58. One French correspondent suggested that the Special Court had made Phra Yot out to be a 'great patriot' as part of a Siamese scheme to lay 'an indictment for persecution and barbarism against France, incite hatred of the French name and place Siam under the protection of the British Lion': FO 881/6586, Inclosure No. 10 'Extract from the *Courrier d'Haiphong* of 17 March 1894', in No. 78, above n 40.

[77] No. 53, above n 76.

[78] No. 58, above n 76. This same official stated that since '[i]t would be unwise to count on absolute justice in political or international matters even in our own country, we can therefore imagine what this kind of justice means in the mind of a Siamese'.

[79] Although the Constitution of the Mixed Court confirms that 'slight alterations' to (France's) initial draft of the Rules of procedure were made by 'mutual consent', there are no documents in the French, Belgian or English archives that show which party had input into which rules. 'First Part—Constitution of the Mixed Court—Rules of Procedure' in *The Case of Kieng Chek Kham Muon Before the Franco-Siamese Mixed Court—Constitution of the Mixed Court and Rules of Procedure—The Trial, Judgment and Condemnation of Phra Yot* (June 1894) <http://www.archive.org/details/caseofkiengchekk00franrich> (accessed 3 March 2013).

presided over by two French judges, two Siamese judges and a French President, each authorized to 'ask from the witness or the accused any explanation . . . necessary to discover the truth'.[80] The accused was entitled to:

1) receive a copy of the *acte d'accusation* at least three days in advance of his trial;
2) 'appear free' before the Justices;
3) the assistance of counsel;
4) receive a faithful translation of the proceedings;
5) respond to the testimony of prosecution witnesses;
6) put questions to a prosecution witness through the President;
7) present exculpatory evidence, including evidence that undermined the credibility of a prosecution witness.[81]

The Rules also defined the crimes over which the Mixed Court would exercise jurisdiction (murder, assassination, theft, incendiarism, parricide, infanticide and poisoning) and listed the applicable modes of liability,[82] pursuant to which the prosecutor submitted the following *acte d'accusation* on 27 May 1894:

The accused Phra Yot Muang Kwang, about 40 years of age, Siamese mandarin . . . , is accused:

1) Of having, at Kieng Chek, been an accomplice in a wilful homicide committed on the person of . . . Grosgurin, in provoking by culpable machinations and artifices, the said homicide; in giving himself to the author or authors instructions for its committal; in procuring arms and other means of action, knowing they would be used for that purpose and in aiding and knowingly abetting the authors in the acts which prepared, facilitated, and consummated it. With this circumstance, that the said homicide was committed with premeditation.

2) Of having, under the same circumstances of time and place, and by the same means enumerated above, become accomplice of the crime of wilful homicide committed on the persons of diverse Annamite militiamen and of the Cambodian interpreter Boon Chan. With this circumstance, that the said homicides were committed with premeditation.

[80] 'First Part—Constitution of the Mixed Court—Rules of Procedure' in *Franco-Siamese Mixed Court*, above n 79, rules 2 and 8. Interestingly, only the President was granted the authority to 'obtain all information . . . necessary to discover the truth': 'First Part—Constitution of the Mixed Court—Rules of Procedure' in *Franco-Siamese Mixed Court*, rule 9.

[81] 'First Part—Constitution of the Mixed Court—Rules of Procedure' in *Franco-Siamese Mixed Court*, above n 79, rules 1–4 and 8. The accused retained his Cingelese attorney from the national proceedings, Mr Tilleke, in addition to the French-speaking M. Duval of Saigon.

[82] Crimes were listed in Articles 1, 2, 6, 8 and 10. Assassination was defined as 'murder committed with premeditation or through ambush': 'First Part—Constitution of the Mixed Court—Rules of Procedure' in *Franco-Siamese Mixed Court*, above n 79, Article 2. Although the Rules did not explicitly provide for principal liability, the applicability of this mode of liability may be inferred from Article 4: 'Accomplices of a crime or an offence shall incur the same punishment as the authors of such a crime or offence, except when the law will have disposed otherwise.' Article 5, which defined the scope of accomplice liability, is noteworthy for its comprehensiveness:

3) Of having, under the same circumstances of time and place, been an accomplice in diverse thefts of personal property, effects and apparel, arms and munitions, committed to the prejudice of the same and of the Annamite militiaman Nguen van Khan and knowingly concealing all of part of the articles stolen.

4) Of having, under the same circumstances of time and place, been an accomplice of the crime of wilful incendiarism of diverse Laotian huts used for habitation, in giving instructions for its committal and knowingly aiding and abetting the authors in the acts which prepared, facilitated and consummated it.[83]

The Rules prescribed capital punishment for an accused found guilty of murder, assassination, theft or incendiarism, but permitted the judges to exercise their discretion and reduce a death sentence to between five and twenty years hard labour if, in their opinion, 'extenuating circumstances in favour of the Accused' existed.[84]

(2) Phra Yot's re-trial before the Mixed Court

Phra Yot's trial before the Mixed Court, which commenced on 4 June 1894, was a theatrical affair. The trial itself was held in the French Embassy, in a room guarded by marines armed with loaded rifles and fixed bayonets. Entry to the trial was granted exclusively to individuals who had received a ticket from the French legation, and the accused was transported to and from court in chains.[85] Over the course of four days President Mondot (President of the Court of Appeal at Hanoi), Judge Cammatte (Councillor of the Court of Appeal at Saigon), Judge Fuynel (Procurer of the French Republic at Mytho), Judge Maha Thibodia and Judge Phya Sukari heard the testimony of the accused, Nguen van Khan and six defence witnesses.[86] Almost all of the witnesses had already testified or had their statements read before the Siamese Special Court, and their evidence before the Mixed Court

[Individuals who] [s]hall be punished as accomplices of an action termed crime of offence:

Those who by gifts, promises, menaces, abuse of authority or power, culpable machinations or artifice, shall have provoked such an action.
Those who shall have procured arms, instruments or any other means employed to commit the action, knowing that they were to be employed to commit it.
Those who knowingly shall have aided or abetted the author or authors of the action, in the facts which led up to, or facilitated or prepared it, or those that completed it.

[83] 'Second Part—First Sitting' in *Franco-Siamese Mixed Court*, above n 79, 9.

[84] 'First Part—Constitution of the Mixed Court—Rules of Procedure' in *Franco-Siamese Mixed* Court, above n 79, rule 11 and Article 12.

[85] FO 881/6628, Scott to Kimberley, 25 June 1894, No. 46 (describing the trial as 'stagey and melodramatic in the extreme'). Gustave Rolin-Jaequemyns, James G. Scott and various Siamese Ministers attended the trial. See generally Walter E.J. Tips, *Gustave Rolin-Jaequemyns and the Making of Modern Siam: The Diaries and Letters of King Chulalongkorn's General Adviser* (Bangkok: White Lotus, 1996), 69; Scott Diary, above n 45, 62 (journal entry for 4 June 1894). Rolin-Jaequemyns encouraged King Chulalongkorn not to attend, arguing that '[w]hatever may be the final result, the fact of a Siamese subject being tried by foreign judges, is in itself a sad and unfortunate event and it is better that the King's presence should be kept as far as possible from it': Tips, *Gustave Rolin-Jaequemyns*, 70.

[86] The Court read into evidence Phra Yot's letters to Captain Luce and Luang Vichit, as well as Boon Chan's testimony before the Special Court read into evidence, Boon Chan having died in the interim

was consistent with the version of events that each had previously provided. Only President Mondot's examination of the accused is noteworthy, not for its particularly effective extraction of hitherto undiscovered evidence, but for the President's aggressive style of questioning:

Q: Did Grosgurin explain to you why he arrested Luang Anurak?
A: He told me because Luang Anurak had spread certain alarming rumours at Kham Muon that the Siamese would return in force.
The President: Grosgurin had a perfect right to arrest Luang Anurak after that, in self defence, for he was in an unknown country and only had a handful of men whose fidelity was doubtful. . . .
Q: Considering that France and Siam were not at war at the time, why did you take such a large body of men to ask for the release of Luang Anurak, seeing that Grosgurin and the Annamites were living in private houses?
A: I had not at the time the least intention of attacking Grosgurin. I simply went to ask for the release of Luang Anurak.
Q: It is quite impossible to believe that Grosgurin who was sick and whose party was the weakest would be the first to attack. The Siamese witnesses have stated that there were at least 100 men surrounding the house. . . .
Accused here stated that after Grosgurin had been told that peace would be broken Luang Anurak jumped from the verandah when immediately a shot was fired from the house which killed a soldier from Korat. Several other shots followed and two more men fell before the Siamese began firing. The men of Grosgurin were arrayed at the foot of the stairs. Grosgurin was above.
The President: That version is difficult to believe, all the witnesses have agreed that this was not so, in their depositions in Saigon and Bangkok.[87]

(3) The Mixed Court's verdict

On 13 June 1894 the Affair of Kham Muon was brought to a close when the accused was found guilty by majority (the two Siamese judges refused to sign the verdict) as an accomplice to the assassination of Grosgurin and fifteen Annamite soldiers, but acquitted of any thefts and burning that took place during or after the gunfight.[88] The gravamen of the verdict lay in the fact that:

By [his letter] dated May 28 Phra Yot repudiated the formal engagement contained in the letter he had written five days before to Capt. Luce; in breaking thus the compact which he

between trials: 'Second Part—Second Sitting' in *Franco-Siamese Mixed Court*, above n 79, 17. The Court spent only a little over an hour examining all six defence witnesses: 'Second Part—Third Sitting' in *Franco-Siamese Mixed Court*, above n 79, 18–22.

[87] 'Second Part—First Sitting' in *Franco-Siamese Mixed Court*, above n 79, 9–13. The President adopted a decidedly more conciliatory tone with the prosecution's sole witness, Nguen van Khan: 'Second Part—Second Sitting' in *Franco-Siamese Mixed Court*, above n 79, 14–16.

[88] 'Third Part—Judgment' in *Franco-Siamese Mixed Court*, above n 79, 37–8. *Le Temps* suggested that the vote of the Siamese judges could be explained by the fact that the judges were of the same caste with the accused: 'Siam', *Le Temps* (Paris, France) 28 July 1894.

had freely made with the French officials without even being able to pretend now that he had received at that moment any order, any advice which led to that sudden determination he not only committed a disloyal act, he spontaneously and voluntarily assumed the penal responsibility of the crimes which would necessarily result as the immediate consequence of that provocation.

. . .

It was [Phra Yot] who caused troops to arrive, who went himself to fetch them at Wieng Kratone, and who conducted them to the place where, under his direction and with his assistance, they committed the murder which it is the duty of the Court to punish.[89]

The majority recognized Kham Muon as French territory[90] and reasoned that the laws of war could not be applied to the case, inasmuch as Convention Article III had described the act the Court was charged with examining as '*attentat*' and thereby confirmed that '[p]eace reigned between France and Siam' at the time the crime was committed.[91] The majority also declined to exonerate the accused on the grounds of self-defence, noting that:

If the law allows the legalisation of an act committed when we are menaced with death, it is only in the case in which the imperious necessity of self-preservation makes it a duty. One can only resist an aggression; and it is evident that Grosgurin, confined to his room by illness, as is attested by all the witnesses who were near him, surrounded by a small number of Annamites, could not for an instant have thought of attacking the numerous armed troops which surrounded his house.[92]

Phra Yot was sentenced to death for the assassinations, but had his sentence commuted to twenty years' hard labour on the grounds that he had not acted with the 'view to gratify . . . cupidity and to satisfy [the] feeling of hatred or personal vengeance' that characterized the 'ordinary assassin'.[93]

The Siamese, who had always suspected that French judges would be biased against the accused,[94] toyed with the idea of refusing to carry out any sentence and contemplated 'forcible resistance' against the French as early as 10 June 1894, several days before the verdict was handed down.[95] But it was France's decision to follow the verdict with a demand that Phra Yot serve his time in a French penal colony that cemented Siam's will to resist.[96] The Siamese government expressed its willingness to carry out Phra Yot's punishment on Siamese territory, but categorically

[89] 'Third Part—Judgment' in *Franco-Siamese Mixed Court,* above n 79, 36–7. These paragraphs reflect the entirety of the Mixed Court's determination of liability, the remainder of the opinion being devoted to a description of the facts of the Affair.

[90] 'Third Part—Judgment' in *Franco-Siamese Mixed Court,* above n 79, 35.

[91] 'Third Part—Judgment' in *Franco-Siamese Mixed Court,* above n 79, 36.

[92] 'Third Part—Judgment' in *Franco-Siamese Mixed Court,* above n 79, 36.

[93] 'Third Part—Judgment' in *Franco-Siamese Mixed Court,* above n 79, 37, 39.

[94] See Letter of 6 June 1894 from Prince Damrong to Rolin-Jaequemyns in Tips, *Gustave Rolin-Jaequemyns*, above n 85, 70 (in which Damrong writes of his feeling that Phra Yot's fate 'has been decided before [the trial]. The verdict has been guilty.').

[95] FO 17/1222, Scott to Kimberley, 10 June 1894, No. 37. See also FO 881/6586, Scott to Kimberly, 10 June 1894, No. 99.

[96] Damrong wrote to Rolin-Jaequemyns 'the news which reached me today that they want to take [Phra Yot] away from his native land is too much to bear. I quite agree with the attitude taken by my brother [Prince Devawongse]. There is really no other alternative, in my judgement, but to make a

refused to allow the former Commissioner to be removed from Siam to a place where 'all language, climate, ideas, would be totally unknown, unintelligible, and foreign to him, and where he would lose, from the first moment, any prospect of ever seeing again his country, his friends and his own family'.[97] Only the timely intervention of the British Foreign Office prevented the fragile peace that prevailed between Siam and France from breaking; under a British-brokered plan Phra Yot served his sentence in a Siamese prison, and a member of the French legation visited him periodically to check that his punishment was duly carried out.[98]

(V) An Assessment of the Mixed Court

Situating the Franco-Siamese Mixed Court in the dominant contemporary narrative of historic international criminal law, which portrays the international justice enterprise as indelibly righteous and even-handed, is not an easy or straightforward task. The Mixed Court is redolent of 'victor's justice' and is inexorably linked to the exploitive institution of colonialism, and Phra Yot's treatment at the hands of the French instinctively offends our contemporary notions of due process. Moreover, the potentially redeeming qualities of the Court are difficult to definitively characterize as such in the absence of impartial records. Were the Rules of Procedure that afforded the accused basic rights a hard-won victory by the Siamese or a cynical indulgence by French plenipotentiaries confident that their Court appointees would render a verdict favourable to France? Did the French judges perceive themselves to have transcended any quid pro quo associated with their appointment and to have fairly judged the accused? Was the creation of the Mixed Court inspired by the proliferation of neutral inter-state arbitral tribunals that predated it, or was it an extension of the resented and magisterial 'consular court' system maintained and operated by the centres of colonial power throughout their respective spheres of influence? Although the biased, fragmented and, in some cases, incomplete papers maintained in the French, Belgian and British archives provide no definitive answers to these questions, in this section I will make a very preliminary attempt to describe the relevance of the Mixed Court to modern ICL in a manner that is consistent with the available evidence.

stand and take the consequences': Letter of 15 June 1894 from Prince Damrong to Rolin-Jaequemyns, in Tips, *Gustave Rolin-Jaequemyns*, above n 85, 70.

[97] FO 881/6628, Inclosure No. 7 'Prince Devawongse to M. Pilinski', in Scott to Kimberley, 18 June 1894, No. 27. Devawongse threatened to resign rather than hand over the former Commissioner, and King Chulalongkorn was prepared to resist the French on this point, even if it cost him the throne: No. 46, above n 85; FO 881/6586, Scott to Kimberley, 16 June 1894, No. 106.

[98] No. 46, above n 85. See also FO 881/6586, Inclosure 'Memorandum', in Marquis of Dufferin to Kimberley, 22 June 1894, No. 112. King Chulalongkorn, with the permission of the French, pardoned Phra Yot in 1898: Tips, above n 85, 133. Phra Yot has been memorialized with a statue in the Nakhom Phanom province of Thailand, an exhibit related to his case in the Court Museum in Bangkok and through the play 'Pra Yod [sic] of Muang Kwang' by Sompop Chandraprabha.

(1) The character of the Court and the genesis of complementarity

Impressing the 'international court' appellation on the Mixed Court has implications beyond the theoretical; the more international the Court is perceived to be, the more significance will be ascribed to its existence and jurisprudence.

The strongest argument in favour of characterizing the Court as an international entity would be that the judges did not completely foreclose the possibility of applying the international law of war to the proceedings. Recall that the judges rejected the laws of war on the grounds that the 1893 Convention purportedly established that a state of peace prevailed between the France and Siam. This reasoning suggests that the judges believed they could have employed the law of war but for the Convention language to the contrary, and by extension that the Court, with its apparent access to law set forth outside of the four corners of its constituent agreement, was more international than not.

To be sure, this interpretation has a certain intuitive appeal. The conflict between France and Siam falls squarely within the modern conception of war, and crimes of the sort Phra Yot was accused of perpetrating are specifically prohibited by contemporary *jus in bello*. It must be recalled, however, that in 1893 armed engagements, even engagements between two militias acting under the authority of their respective governments, were often still considered mere 'acts of reprisal' (measures of forcible coercion short of war to which the laws of war did not apply).[99] Indeed, neither France nor Siam ever acknowledged that they were engaged in a 'war'. France explicitly referred to the existence a 'state of reprisals' between the two adversaries in its 29 July 1893 Statement of Blockade,[100] and there is no indication that the Siamese deduced that a state of war existed from the fact that French military operations had been carried out in Siamese territory.[101] While it is tempting to conclude that the parties intended to terminate a state of war from the fact that the October 1893 Treaty was referred to as one of 'Peace and Friendship' in the Convention of the same date, there is precedent against drawing this inference.[102]

[99] See William J. Ronan, 'English and American Courts and the Definition of War', *American Journal of International Law*, 31 (1937), 649.

[100] FO 881/6749, Inclosure No. 3 'Notification of Blockade, dated 29 July 1893', in Admiralty to Foreign Office, 8 September 1893, No. 394. Louis Dartige Du Fournet, Commander of the *Comète* (one of two French ships to have exchanged fire with Siamese ground forces in July 1893 in what would come to be known as the Paknam Incident) repeatedly suggested that France and Siam were not in a state of war: Louis Dartige du Fournet, *Journal d'un Commandant de La Comète: China-Siam-Japon (1892–1893)* (Plon, 1915) 234, 237, 249 (journal entries for 20 July 1893, 25 July 1893 and 3 August 1893).

[101] MAE, Siam 16, Enclosure No. 1 'Note Verbal' summarizing 2 June 1893 meeting between Devawongse and Pavie, in Dispatch from Bangkok, 25 June 1893, No. 109 (in which Devawongse inquires of Pavie whether Siam's capture of France's Captain Thoreux was a lawful response to an act of war on the part of France); Tips, *Siam's Struggle*, above n 10, 91 (journal entry for 14 July 1893) (in which Rolin-Jaequemyns describes how he explained to the King that the two French gunboats that had been sent to Bangkok in response to the Affair would abstain from attacking Siam as the two countries were not officially at war).

[102] See *Cushing, Adm. v United States*, 22 Ct. Cl. 1 (USA, 1886). See also *French Spoilation Claims: Message from the President of the United States Transmitting a Communication from the Secretary of State, Accompanied by a Report of Somerville P. Tuck, in Relation to French Spoilation Claims* (Govt. Print. Off. 1888), 12.

The superior view is that the Court's insinuation that it had the power, in theory, to draw upon the law of war amounts to specious overreaching. Had the judges actually applied international law, it would have been to acts that the relevant states acknowledged were not governed by that body of law, a result that is counter-intuitive and against a great deal of coeval authority.[103]

Although the Mixed Court lacks for the most distinctive hallmark of internationality (the ability to apply international law) it cannot be understood as a singularly French or Siamese institution.[104] The ad hoc nature of the Rules and their appearance in a legal instrument agreed to by two states, the presence of judges from two states on the tribunal,[105] and Siam's agreement (however coerced) to 'mix' its jurisdiction with that of France to try the purported criminal Phra Yot, suggests that the Mixed Court is best understood as the first modern supranational criminal tribunal. It is this last component, the pooling of jurisdiction, that is undoubtedly one of the Mixed Court's most noteworthy features, as it denotes a shift from restrained notions of criminal jurisdiction towards the more expansive and flexible conceptions and practices that would come to characterize the field in subsequent centuries.[106]

[103] See eg, *Janson v Driefontein Consolidated Mines, Ltd.* [1902] AC 484 ('However critical may be the condition of affairs . . . so long as the government of the State abstains from declaring or making war or accepting a hostile challenge, there is peace.'); *Gray, Adm. v United States*, 21 Ct. Cl., 340 (USA, 1886) (Finding that a state of war did not exist between France and the United States where '[t]here was no declaration of war; the tribunals of each country were open to the other—an impossibility were war in progress; . . . there were retaliation and reprisal, but such . . . have often occurred between nations at peace; there was a near approach to war, but at no time was one of the nations turned into an enemy of the other in such a manner that every citizen of the one became the enemy of every citizen of the other'); *Cushing, Adm. v United States*, 22 Ct. Cl. 1 (USA, 1886) (Holding that 'Congress did not consider war as existing, for every aggressive statute looked to the possibility of war in the future, making no provision for war in the present, and France, our supposed enemy, absolutely denied the existence of war.'); *Bishop v Jones & Petty*, 28 Tex. 294 (1886) (in which the Supreme Court of Texas held that '[h]ostile attacks and armed invasions of territory or jurisdiction of a nation, accompanied by the destruction of life and property by officers acting under the sanction and authority of their governments, however great and flagrant provocations to war, are often atoned for and adjusted without its ensuing.').

[104] In fact, the substantive law applied by the Court was based on French law. A comparison between, for example, the definition of the crime of assassination found in Article 2 of the Rules of the Court and analogous definitions in Article 296 of the French *Code pénal de 1810*, Article 101 of the Lieber Code (1863), Article 13 of the Brussels Declaration (1874) and Article 8 of the Oxford Manual (1880) establishes that this portion of the text was inspired by the French statute, as opposed to the more expansive and comprehensive articulations of the crime found in the pre-existing codifications of the *jus in bello*. The definition of the crime of arson that appears in Article 11 of the Rules is similar to Article 434 of the *Code pénal*, though it appears to have been modified to fit the particulars of the crime Phra Yot was accused of perpetrating (ie, house-burning).

[105] The trial record reflects that the Siamese judges participated only twice in the day-to-day proceedings of the trial, at one point attempting to clarify the meaning of some physical evidence for the Accused, and later to question a witness. 'Second Part—First Sitting' in Franco-Siamese Mixed Court, above n 79, 13; 'Second Part—Second Sitting' in Franco-Siamese Mixed Court, above n 79, 17. Ultimately, however, the minority status and nominal participation of the Siamese judges erodes but does not extirpate the Court's veneer of supranationality.

[106] For example, the *Einsatzgruppen* court justified the existence of the Nuremberg Military Tribunals as a valid exercise of pooled jurisdiction, explaining that 'if a single national may legally take jurisdiction in such instances, with what more reason may a number of nations agree, in the interests of justice, to try alleged violations of the laws of war'. *US v Ohlendorf et al* ('*Einsatzgruppen Case*'), reprinted in

Remarkably, the Convenion also anticipated the basic 'complementarity' framework that is a hallmark of international crimes prosecutions in the modern era. Convention Article III on its face *presumed* that a Siamese national court would dutifully fulfill its obligation (regrettably articulated as an obligation to 'punish' as opposed to 'try') while creating a supranational authority capable of re-adjudicating the matter in the exceptional event that domestic proceedings were deficient. Although the potentially revolutionary impact of this arrangement went unrecognized at the time—the Mixed Court was neither mentioned in contemporaneous issues of the *Revue de droit international et de législation compare* or the *Revue générale de droit international public*, nor discussed by the delegates at the subsequent meetings of *l'Institut de Droit international* or the *International Law Association*—the Court's creation pursuant to an instrument that (even insincerely) acknowledged the primacy of a domestic court marks a point of inflection in the development of the idea that a supranational tribunal can be vested with supplemental jurisdiction.

(2) The birth of international due process

Because the Mixed Court is so distinctively 'modern' it feels natural to bring our present-day expectations about the nature and quality of international justice to bear upon the Court. From the perspective of today's reader, the record of the Mixed Court's operation is rife with questionable decisions and procedural shortcomings. The most obvious of these are the seemingly brief time (one week) the Defence was afforded to prepare its case, the combative and heavy-handed attitude demonstrated by the President of the Court as he questioned the Accused, and the Court's superficial analysis with respect to the inapplicability of the Law of War and the guilt of the defendant.

It is possible, however, to explain each of these 'flaws' without recourse to theories of deceptiveness or tendentiousness. The 1808 *Code d'instruction criminelle* ('the *Code*'), which was applied throughout France and French Cochinchina[107] (and with which the three French judges would have been most familiar), did not oblige criminal judges to maintain an appearance of impartiality during trial proceedings. Instead, the *Code* vested criminal judges with broad discretion to take any action at trial considered 'useful to discovering the truth', subject only to the limits of their honour and conscience.[108] No French observer would have expected President Mondot to maintain an impartial façade if his judicial instincts suggested he do otherwise. Nor would the insouciantly brief nature of the verdict have shocked French citizens. While the *Code* obliged judges to submit written opinions, the French never adopted the practice of issuing lengthy or discursive decisions in the

IV Trial of War Criminals before Nuremberg Military Tribunals Under Control Council Law No. 10 (US GPO, 1951), at 492.

[107] Peter Zinoman, *The Colonial Bastille: A History of Imprisonment in Vietnam, 1862–1940* (Berkeley, CA: University of California Press, 2001), 40.

[108] *Code d'instruction criminelle de 1808* (France), Article 268.

manner of their common-law counterparts.[109] It is also to the credit of the Mixed Court that the accused had seven days to prepare his case, as the *Code* and the Rules of the Court afforded the Accused a mere three.[110] Lastly, while hardly constituting definitive evidence that the French judges excercised their judicial duties without bias, it is noteworthy that they commuted Phra Yot's death sentence, a decision that is reported as having been unpopular with the French community in Bangkok.[111]

Moreover, while the decision to decline to apply the laws of war to an armed affray between two state militias may seem prejudicial today, particularly when that body of law may have favoured the accused,[112] it must be recalled that in 1894 the line between reprisals and war was fluid, and many eighteenth- and nineteenth-century courts struggled to develop a test that could reliably distinguish between the two states.[113] While it is true that at the time of Phra Yot's trial a number of foreign courts had developed and applied multipart tests that accounted for the 'objective realities' associated with the conflagration at issue, including the intent of the parties, the degree of armed resistance to the 'challenge' issued by an intervening state and the scale and duration of the hostilities, judges of a more conservative disposition persisted throughout the nineteenth century in looking only to whether an official declaration of war had been issued by at least one of the belligerent parties.[114] Taking into account the the unsettled status of the law, the Mixed Court's ultimate eschewal of the *jus in bello* in favour of the ad-hoc law set forth in the Rules should not of itself be regarded as evidence of bias.

Of course there are other indications that the French judges, 'if indeed they had not definite orders, came full of the conviction that if they did not find Phra Yot guilty and punish him they would be found wanting themselves by their countrymen, and would have suffered accordingly'.[115] Le Myre had openly treated the verdict as a foregone conclusion, and the French judges that heard Phra Yot's case enjoyed prestigious positions in France's colonial possessions. British chargé James G. Scott reported that the President openly scoffed at the defence witnesses before they had even begun to testify, displayed the 'strongest animus' towards the accused and excluded his Siamese co-adjutors from deliberations.[116] Moreover, it is inherently difficult to regard as unprejudiced a court that took a little over an hour to examine

[109] William D. Popkin, *Evolution of the Judicial Opinion: Institutional and Individual Styles* (New York, NY: NYU Press, 2007), 38.

[110] 'First Part—Constitution of the Mixed Court—Rules of Procedure', above n 79, rule 1; *Code*, above n 108, Article 184. Moreover, as the factual record was well developed at the first trial, the judges, Plenipotentiaries and parties may simply have assumed that additional time to prepare was unlikely to result in the discovery of additional evidence.

[111] No. 27, above n 97.

[112] 'The Trial of Phra Yot—Eleventh Day' in *Full Report*, above n 46, 50–1.

[113] See for example *United States v Plenty Horses* (1891), in which the existence of a state of war between the Lakota Nation and the United States was contentiously debated: Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge: Cambridge University Press, 2010), 30.

[114] See above n 103.

[115] No. 46, above n 85.

[116] No. 27, above n 97. The trial transcript confirms that the President disparaged at least one defence witness; as Honiu Visot took the stand, the President remarked that he 'did not appear [to be] very intelligent': 'Second Part—Third Sitting' in *Franco-Siamese Mixed Court*, above n 79, 21. There may

all of the defence witnesses, and originated in a convention signed under duress and an Article that *prima facie* presupposed the guilt of the accused.

Although it is unlikely that the cloud of suspicion hanging over the trial will ever fully dissipate, it is commendable that the Rules of the Court afforded Phra Yot more rights than *any* enacted or proposed international legal instrument with a criminal component drafted prior to the 1944 Draft Convention for the Establishment of a United Nations War Crimes Court.[117] Regardless of any structural or procedural defects that marred Phra Yot's actual trial, the Rules of the Mixed Court, *qua* Rules, represented a major stepping stone towards the complete internationalization of the principle that an individual brought before a criminal tribunal is entitled to a fair trial and the benefits of codified procedural protections.

(3) The Mixed Court and the cultivation of new substantive norms

Rolin-Jaequemyns' objections to the creation of a Mixed Court, raised during the negotiations between Devawongse and the French Plenipotentiary, mark the first time that the legality of a supranational criminal court was challenged on the grounds (1) that one of the state signatories to the establishing treaty lacked the authority to delegate its criminal jurisdiction to such a court; and (2) that bringing an accused before a new tribunal with retroactive jurisdiction over 'past crimes or offences' would amount to a serious violation of their rights (*nullum crimen*, *nulla poena sine*

have been similar incidents that simply went unrecorded, as there is some indication that the transciptionist or publisher may have elected, for reasons of their own, to provide a less than complete picture of the trial. For example, during his closing arguments defence counsel M. Duval responded to the President's (alleged) insinuation offered 'in the course of [the] debates' that defence witnesses were 'repeating a lesson learnt by heart', yet the President is nowhere recorded as having made any such insinuation: 'Second Part—Fourth Sitting' in *Franco-Siamese Mixed Court*, above n 79, 29.

[117] United National, Draft Convention for the Establishment of a United Nations War Crimes Court (30 September 1944) Article 15, reprinted in *Historical Survey of the Question of International Criminal Jurisdiction*, UN Doc. A/CN.4/7/Rev. 1 (1949), 112.

Gustave Moyneir's 1872 proposal for an international criminal court afforded broad discretion to individual trial panels in determining the rules of procedure they would apply: Christopher Hall, 'The first proposal for a permanent international criminal court', *International Review of the Red Cross*, 322 (1998), 57. The treaties establishing the nineteenth-century anti-slavery 'mixed courts of justice', which lacked criminal jurisdiction over the crews of slave vessels but had the authority to remit crew-members to their home country to face domestic criminal proceedings, did not provide procedural protections for the crews of seized ships, but did require that judges and arbiters take an oath to judge fairly and with impartiality. See eg Treaty Between the United States of America and Great Britain, for the Abolition of the African Slave Trade, signed 7 April 1863, 12 Stat 1125 (entered into force 25 May 1862). See also Jenny Martinez, 'Anti-Slavery Courts and the Dawn of International Human Rights Law', *Yale Law Journal*, 117 (2008), 591.

In January 1919 the British Committee of Inquiry into the Breaches of the Laws of War called for the creation of an international tribunal to try 'enemy persons alleged to have been guilty of offences against the laws and customs of war'. Although the British proposal established minimum procedural protections to which the accused would be entitled, the Allies, acting through the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, however, eventually agreed only to suggest the creation of an international tribunal authorized to 'determine its own [rules of] procedure': CAB 24/72, First Interim Report from the Committee of Inquiry into the Breaches of the Laws of War, 13 January 1919, 16. 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties', *American Journal of International Law*, 14 (1920), 122.

praevia lege poenali). Additionally, it was only the second time that trial before a supranational court had been disparaged as a breach of an individual's right to be tried by a court of their home country (*jus de non evocando*), the first being the trial of von Hagenbach before a twenty-eight judge panel at Breisach over four hundred years before.[118] Although these objections (regrettably) were not introduced during the trial and therefore were not addressed in the verdict, the establishment of the Mixed Court implicitly affirms the precepts that states can pool their criminal jurisdiction, that the principle of legality does not proscribe an *ex post facto* supranational court tasked with examining violations of *jus gentium* from ruling on the individual criminal responsibility of an accused,[119] and that *jus de non evocando* does not preclude a trial before judges of a supranational criminal jurisdiction.

The Mixed Court is also notable as the first distinctively Westphalian supranational tribunal[120] to apply the then-nascent doctrines of participative liability and command responsibility,[121] as well as to consider motive a mitigating circumstance in the imposition of sentence.[122] Alas, the judges' reasoning is too opaque, their inclination to intermingle discussions of fact with findings on liability and sentencing too pronounced, their verdict too brief and their impartiality in too much doubt to ascribe much meaningful precedential value to any of their scant legal findings.

(VI) Conclusion

In light of the international criminal lawyer's voracious appetite for precedent and the sheer number of successful and unsuccessful attempts to create international courts since 1893, it is shocking that the Mixed Court has not already assumed

[118] Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge: Cambridge University Press, 2005), 19.

[119] The French considered Phra Yot's actions a violation of *jus gentium* but not a violation of the laws of war: see above section V(1) and n 15.

[120] See 'Third Part—Judgment' in *Franco-Siamese Mixed Court*, above n 79, 37. Von Hagenbach was tried before twenty-eight judges representing different political entities (principally city states) in the Upper Rhine. These political entities were not 'states' in the Westphalian sense and their relationship with the Holy Roman Empire (and by extension their status and the status of the von Hagenbach court in international law) is contested: see Timothy McCormack, *From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime* in Timothy L.H. McCormack and Gerry J. Simpson (eds), *The Law of War Crimes: National and International Approaches* (Boston, MA and Leiden: Martinus Nijhoff, 1997), 38; George Schwarzenberger, *International Law as Applied in International Courts and Tribunals* (London: Stevens & Sons, 1968), 466.

[121] The Rules of the Court blended these two modes of liability by providing for command responsibility only to the extent that an individual who 'abused authority or power' qualified as an accomplice to a crime: 'Second Part—First Sitting' in *Franco-Siamese Mixed Court*, above n 79, 9; 'First Part' in *Franco-Siamese Mixed Court*, above n 79, Article 5.

[122] The judges did not clarify whether it was Phra Yot's desire to follow the Commissioner's orders or his goal of ejecting the French soldiers from Kham Muon that warranted mitigation. For an example of a contemporary international court adopting a similar approach to mitigating circumstances and sentencing, see International Criminal Court R.P. & Evid. Rule 145 (instructing the Chambers of the International Criminal Court to account for inter alia 'the degree of participation of the convicted person' and 'the degree of intent' during sentencing).

the same totemic status as the trial of von Hagenbach. How has the Mixed Court slipped through the cracks? [123]

R. John Pritchard, writing on the similarly neglected international crimes trials that followed the Great Powers intervention in Crete in 1898, has theorized that the Allies downplayed their experiences with international criminal law in an effort to conform to the anti-international trial stance maintained by the United States at the close of World War I.[124] This theory is not entirely implausible, as there is some evidence that suggests that the Mixed Court was at one time considered worthy of remembrance. There is tantalizing hint, for example, in the form of an 1895 *Sydney Morning Herald* article discussing the potential criminal liability of Chinese officials for the massacre of European and American missionaries, that the Mixed Court briefly came to stand for the (then novel) proposition that the de facto immunity political figures implicated in mass crimes directed at foreign citizens enjoyed before domestic courts should be circumvented with fair and impartial international tribunals.[125] There is also a passing reference to the Mixed Court in a 1931 *Recueil des Cours* entry on municipal courts, state responsibility and denials of justice, implying that the Court remained relevant to international law experts even after the turn of the century.[126]

Lacking a legacy, it falls to the current generation of international lawyers to bestow one upon the Court. Certainly there is no shortage of material to work with. The motifs of imperialism, intercultural enmity, fairness and accountability run through the story of the Mixed Court, as they do through the competing narratives interested parties have associated with twentieth and twenty-first century international judicial institutions, and the Mixed Court, as a treaty-based and statutorily-regulated supranational judicial machine applying ad hoc law, is readily identifiable as direct forerunner of these more ambitious and powerful successors. With this in mind, it is clear that the most interesting chapters on the Mixed Court remain to be written.

[123] None of the proposals for the creation of international tribunals that followed WWI and WWII so much as mentioned the Franco-Siamese Mixed Court. See generally *Historical Survey*, above n 117; 'Commission on the Responsibility of the Authors of the War' above n 117; Committee of Inquiry, above n 117.

[124] R. John Pritchard, *International Humanitarian Intervention and Establishment of an International Jurisdiction over Crimes against Humanity: the National and International Military Trials in Crete in 1898* in John Carey, Willian V. Dunlap, R. John Pritchard (eds), *International Humanitarian Law: Origins, Challenges, Prospects* (Ardsley, NY: Transnational Publishers, Inc. 2003) 80–1.

[125] 'The Massacres in China' *Sydney Morning Herald* (Sydney, Australia), 7 August 1895 (in which an anonymous European resident in Foochow called for the chief officials of the province to 'be brought to formal trial before a mixed tribunal, as was the case with Phra Yot…Let these men be tried in the some way, before a tribunal in which representatives of China, Great Britain, France, and the United States sit as Judges. If guilt cannot be brought home, well and good, but if it be shown that they instigated the riots…let sentence be passed upon them adequate to their offence'.).

[126] Jacques Dumas, 'La Responabilite des Etats a raison des crimes et des Delits commis sur leur territoire au prejudice d'etrangers', *Receuil des Cours*, 36 (1931), 200.

4

The Ottoman State Special Military Tribunal for the Genocide of the Armenians: 'Doing Government Business'

*Jennifer Balint**

Legal stories are often buried. Political and social processes subvert and suppress the findings and processes of law. What begins as an important authoritative statement of harm becomes hidden. We see many cases of this. With the political settlement between the new state of Bangladesh, India and Pakistan, for example, the international crimes prosecutions initiated in Bangladesh in the wake of the 1971 war of secession were derailed and the proposed tribunal aborted.[1] Another hidden story has been the *in absentia* trials of Pol Pot and Ieng Sary at the end of the Khmer Rouge regime which, despite their importance to many victims at the time, due to the Cold War context and as political trials were shunned by the international community.[2] In Australia, the 1881 Parliamentary Board of Inquiry into the management of the Coranderrk Aboriginal station in the Australian state of Victoria that ruled in

* Note: the spelling of names, places and terms follows the materials used, which are translations from original documents, resulting in some variations with different authors. Some authors refer to Cemal and others to Kemal. Bey and Pasa are used interchangeably as titles. Spellings can depend on whether the Ottoman or modern Turkish spelling is followed (for example, place names can be different—Baiburt or Bayburt). Some authors refer to the Attorney-General, and some to the Procuror-General.

[1] The new Bangladeshi government passed an Act to 'provide for the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and other crimes under international law' (International Crimes (Tribunals) Act 1973). Special tribunals were established to try Bangladeshi citizens who had collaborated with the Pakistani armed forces. National prosecutions commenced at the end of January 1972, under the Bangladesh Collaborators (Special Tribunals) Order: International Crimes (Tribunal) Act 1973. A tribunal comprising Bangladeshi Supreme Court justices was constituted. These proceedings are now being resurrected. See further, Bina D'Costa and Sarah Hossein, 'Redress for Sexual Violence before the International Crimes Tribunal in Bangladesh: Lessons from History, and Hopes for the Future', *Criminal Law Forum*, *21* (2010), 331–59.

[2] The first decree passed by the new People's Revolutionary Council of Kampuchea after the overthrow of the Khmer Rouge by Vietnam in 1979 was Decree-Law No 1, 'providing for the setting up in Phnom Penh of a People's Revolutionary Tribunal to judge the genocide crimes committed by the Pol Pot-Ieng Sary clique': International Covenants on Human Rights, *Letter dated 4 October 1979 from the Permanent Representative of the Socialist Republic of Vietnam to the United Nations addressed*

favour of local Aboriginal residents in their efforts to stay on the land, was subsumed under political developments that saw the enactment of legislation known as the Half-Caste Acts and the subsequent breaking up of the station.[3] Another example is the judgment by a state court in Australia that found genocide had been committed in the course of British colonization, yet that judgment has failed to enter public consciousness.[4] Stories of injustice recognized by law, yet hidden.

These findings of state crime, of genocide and crimes against humanity, are often contested by the state. Legal statements of state-perpetrated harm are the most disputed stories, as they go to the core of state identity and nationhood. The case of the Ottoman Courts-Martial established in the wake of World War I to prosecute the genocide of the Armenians, with an estimated sixty-three trials run, yet abandoned due to the rise of Kemalism, is a key illustration of this. What had been a recognized and mourned event by the Ottoman state became, through the changed political situation in the formation of modern Turkey, a denied and disputed genocide, with the trials subsequently forgotten. These trials both tell a mostly untold story, that of the Armenian genocide, as well as being a hidden story themselves.

Modern-day Turkey has waged such a campaign of denialism that it has been mostly left to the Armenian community to remember the genocide perpetrated against its members from 1915–1918.[5] Claims have been made that the deportations

to the Secretary-General, UN Doc.A/C.3/34/1, New York: United Nations, 1979. The former Prime Minister Pol Pot and his deputy Ieng Sary were tried *in absentia* and found guilty of genocide by the Revolutionary People's Tribunal of the People's Republic of Kampuchea. See People's Revolutionary Tribunal, Held in Phnom Penh for the Trial of the Crime of Genocide Committed by the Pol Pot-Ieng Sary Clique, Ministry of Information, Press and Cultural Affairs of the People's Republic of Kampuchea, Phnom Penh, August 1979.

[3] The 1881 Inquiry was established by Victoria's Chief-Secretary. The nine commissioners sat for two and a half months. Twenty-one of the sixty-nine witnesses who were examined were Aboriginal. This story has been resurrected recently through the Minutes of Evidence project, an Australia Research Council collaboration between the University of Melbourne and artists, researchers, education experts and community members to promote new modes of publicly engaging with historical and structural injustice through performance, education and research, including the verbatim theatre production *Coranderrk: We Will Show the Country* which uses the record of this inquiry. See further at <http://minutesofevidence.com/> and Jennifer Balint, Julie Evans, Nesam McMillan, Giordano Nanni and Melodie Reynolds, 'The *Minutes of Evidence* Project: Creating Collaborative Fields of Engagement with the Past and Present', in Lynette Russell and Leigh Boucher (eds), *Governance, Race and the 'Aboriginal Problem' in Colonial Victoria 1851–1900*, (forthcoming: Aboriginal History Inc. and ANU E Press, 2013).

[4] Justice Crispin of the Australian Capital Territory Supreme Court found, in proceedings initiated by members of the Aboriginal Tent Embassy (Wadjularbinna Nulyarimma, Isobel Coe, Billy Craigie and Robbie Thorpe): 'There is ample evidence to satisfy me that acts of genocide were committed during the colonisation of Australia': *Re Thompson; Ex parte Nulyarimma* (1998) 136 ACTR 9. See further, Jennifer Balint, 'Stating Genocide in Law: The Aboriginal Embassy and the ACT Supreme Court', *The Aboriginal Tent Embassy: Sovereignty, Black Power, Land Rights and the State*, in Gary Foley, Andrew Schaap and Edwina Howell (eds) (Routledge, 2013).

[5] The Turkish government has sent out reams of books and pamphlets countering the genocide, as well as financing public propaganda campaigns and funding (and disrupting) research. See Richard G. Hovannisian, 'The Armenian Genocide and Patterns of Denial', in Richard G. Hovannisian (ed), *The Armenian Genocide in Perspective* (New Brunswick and London: Transaction Publishers, 1998), 111–33; Roger Smith, 'Denials of the Armenian Genocide', in Israel W. Charny (ed), *Encyclopedia of Genocide* (Santa Barbara, CA: ABC-CLIO 1999), 161–6. Smith relates how a conference in Tel Aviv

(the main feature of the genocide) were a 'wartime necessity' (yet communities away from the war zone also faced deportation)[6] or that the Armenians were an internal threat (yet the Courts-Martial in its indictment noted that 'the deportations [represented] neither a military necessity, nor a punitive disciplinary measure',[7] and documentary evidence gathered by the Tribunal also disproves this allegation).[8] Recent attempts within Turkey have begun to counter the official national myth.[9] Parliaments around the world are acknowledging this genocide.[10] Reparations claims now being brought by the Armenian community may well provide a recognition that has been denied. Bringing the record of these trials to light, may also serve to counter official denialism.

There has been scant academic analysis of these legal proceedings. The Turkish state archives have been closed to most scholars, and while some of the Courts-Martial proceedings were included at the time as special supplements in the government gazette *Takvim-i-Vekâyi*, these remain unpublished and untranslated as a single collection.[11] Further, as Taner Akçam notes, the location of the complete official

was disrupted in 1982 with threats to the safety of Jews in Turkey: Roger W. Smith, Eric Markusen and Robert Jay Lifton, 'Professional Ethics and the Denial of the Armenian Genocide', *Holocaust and Genocide Studies*, *9* (1995), 1–22. When I was an undergraduate student studying genocide in the early 1990s with Professor Colin Tatz at Macquarie University in Sydney, Australia, there were more books produced by Turkey denying genocide than scholarly works on the genocide itself, and the Turkish government also sent an emissary to one of my tutorials to 'counter' what we were taught about the genocide.

[6] Vahakn Dadrian points out, as verified by documents presented to the Tribunal as well as Ottoman census sources, that 61,000 members of the 63,605-strong Armenian community in Ankara were deported, despite Ankara being the 'farthest removed from all war zones': Vahakn N. Dadrian, 'A Textual Analysis of the Key Indictment of the Turkish Military Tribunal Investigating the Armenian Genocide', *Journal of Political and Military Sociology*, *22* (1994), 135–6.

[7] *Takvim-i-Vekâyi*, 3540: Dadrian cited above n 6, 136.

[8] Evidence given included, in the first trial held at the Courts-Martial, a cipher telegram of 14 July 1915 from Colonel Şahabeddin addressed to Colonel Recayi in Ankara, stating that 'there was no evidence whatsoever' about any uprising being planned (*hig bir delail olmadigi*) (2nd sitting, 8 February 1919). See Vahakn N. Dadrian, 'The Turkish Military Tribunal's Prosecution of the Authors of the Armenian Genocide: Four Major Courts-Martial Series', *Holocaust and Genocide Studies*, *11* (1997), 36.

[9] These include the statements by author Orhan Pamuk in 2005 that a million Armenians had been killed (which saw him prosecuted for 'insulting Turkishness'), the translation into Turkish of Vartkes Yeghiayan, *British Foreign Office Dossiers on Turkish War Criminals* (which contains the case information on suspected war criminals compiled by the British), and the publication by lawyer Fethiye Çetin in 2008 of her memoir *My Grandmother* (New York, NY: Verso, 2008) that revealed that her grandmother had been Armenian, and the subsequent publication of gathered stories of Armenians in Turkish families, published as *The Grandchildren* (Fethiye Cetin and Ayse Gül Altinay, Istanbul: Metis, 2009). See Maureen Freely, 'Secret Histories', *Index on Censorship*, *39* (2010), 14–20.

[10] See Rouben Paul Adalian, 'International Recognition of Armenian Genocide', in Israel W. Charny (ed) *Encyclopedia of Genocide*, Vol 1 (Santa Barbara, CA: ABC-CLIO, 1999), 100–1.

[11] Annette Höss, 'The Trial of Perpetrators by the Turkish Military Tribunals: The Case of Yozgat', in R.G. Hovannisian (ed) *The Armenian Genocide: History, Politics, Ethics* (New York, NY: St Martin's Press, 1992), 221, fn 5. Further, as Dadrian notes, outside Turkey only the Jerusalem Armenian Patriarchate Archive and the Nubar Library in Paris own the originals of these 'supplement' issues: Dadrian, above n 7, 30. Kirakossian also notes that the French newspaper *La Renaissance* published in Constantinople also published materials of the sessions: John S. Kirakossian, *The Armenian Genocide. The Young Turks Before the Judgment of History* (Madison, CT: Sphinx Press, 1992), 162.

court records is unknown (while some copies are filed in the Armenian patriarchate in Jerusalem, these are handwritten and not original copies).[12] What this has meant is that much of the work has of necessity focused on piecing together a picture of the trials, including drawing on other government sources such as the United States and British archives. The main analysis until recently—with the publication of Raymond Kévorkian's *The Armenian Genocide: A Complete History*, which includes a section on the trials, and of Taner Akçam's *A Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility*, and the recent publication of Vahakhn Dadrian and Taner Akçam's *Judgment at Istanbul*, the first major work on the trials—has been the substantial work of Vahakhn Dadrian.[13] It is primarily upon Dadrian's work, together with that of John Kirakossian and Taner Akçam, that I rely for information on the Courts-Martial.

(I) The 'Forgotten Genocide' of the Armenians

The genocide of the Armenians was perpetrated by the Ottoman state under the cover of World War I. With the entry of Turkey into the war, an opportunity arose for the destruction of what was seen as an alien nation, the Christian Armenians, and the establishment of a 'Pan-Turkic empire'. The Committee of Union and Progress (CUP) or Ittihad Party (known as the Young Turks), which had on its establishment been a force for change, moved away from what Richard Hovannisian has described as egalitarianism Ottomanism to the ideology of Turkism.[14] Under the leadership of the Young Turks, the Ottoman state moved to annihilate the Armenians

[12] Taner Akçam, *A Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility*, transl Paul Bessemer (New York, NY: Metropolitan Books New York, 2006), 5–6.

[13] See in particular, Dadrian: above n 7, 28–59; *The History of the Armenian Genocide. Ethnic Conflict from the Balkans to Anatolia to the Caucasus* (Oxford and New York, NY: Berghahn Books, 3rd edn, 1997); 'The Documentation of the World War I Armenian Massacres in the Proceedings of the Turkish Military Tribunal', *International Journal of Middle East Studies*, 23 (1991), 549–76. In 2008, Vahakn N. Dadrian and Taner Akçam, *Tehcir ve Taktil: Divan-i Harb-i Orfî Zabitlari. Ittihad ve Terakki'nin Yargilanmasi, 1919–1922* was published in Turkish by Bilgi University Press. This is the first major book devoted to the trials. An English language edition was published in late 2011: Vahakn N. Dadrian and Taner Akçam, *Judgment at Istanbul. The Armenian Genocide Trials* (Oxford and New York, NY: Berghahn Books, 2011). Other work includes Taner Akçam's *A Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility* (New York, NY: Henry Holt and Company); Raymond Kévorkian's *The Armenian Genocide: A Complete History* (London and New York, NY: I.B. Tauris, 2011) which includes a section on the trials, John S. Kirakossian, above n 13; Annette Höss, 'The Trial of Perpetrators by the Turkish Military Tribunals: The Case of Yozgat', in R.G. Hovannisian (ed), *The Armenian Genocide. History, Politics, Ethics* (New York, NY: St Martin's Press, 1992), J.F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (Westport, CT: Greenwood Press, 1982). Vartkes Yeghiayan has collated two sets of documents: the British case notes on suspected Turkish war criminals—*British Foreign Office Dossiers on Turkish War Criminals* (La Verna, CA: American Armenian International College Press, 1991), and the translation of the Courts-Martials transcripts—*The Armenian Genocide and the Trials of the Young Turks* (La Verna, CA: American Armenian International College Press, 1990).

[14] R.G. Hovannisian, 'The Historical Dimensions of the Armenian Question, 1978–1923', in R.G. Hovannisian (ed), *The Armenian Genocide in Perspective* (New Brunswick and London: Transaction Publishers, 1986), 28.

in their search, as Hovannisian has noted, for a homogeneous Turkey rather than a multinational Ottoman Empire.[15] The entry into the war provided the opportunity for this. The secret decision to destroy the Armenian people was taken by the key leaders of the Ittihad Party—Talat, Enver and Cemal (the 'triumvirate').[16] Robert Melson notes that the deportations were coordinated between Talat Pasha's Ministry of the Interior, which was in charge of the civilian population, and Enver Pasha's Ministry of War, which was in charge of the disarmed labour battalions (which contained Armenian soldiers).[17]

The genocide was perpetrated in stages. First came the separation of Armenian soldiers serving in the Ottoman armies into labour battalions. Then, on the night of 24 April 1915, Armenian political, religious, educational, and intellectual leaders throughout the Ottoman state were arrested, deported into Anatolia, and killed.[18] Armenian populations across the Ottoman state were forcibly deported and stripped of their possessions. Armenians serving in the Ottoman armies were also killed. The mass deportation of Armenians was intended to result in their death, with abductions and starvation along the way, together with great cruelty to the mainly women and children. As Hovannisian explains:

> The adult and teenage boys were, as a pattern, swiftly separated from the deportation caravans and killed outright…The greatest torment was reserved for the women and children, who were driven for months over mountains and deserts, often dehumanised by being stripped naked and repeatedly preyed upon and abused. Intentionally deprived of food and water, they fell by the thousands and the hundreds of thousands along the routes to the desert.[19]

Eyewitnesses were later to report on the horrific use of medical experimentation on children, and on the brutality of the destruction of the Armenians in villages and towns throughout the Ottoman state.[20] The orders to destroy the Armenians came from the centre through a series of telegrams sent by the ruling Ittihad leaders to ministers and local governors. One telegram sent by Cemal to the Minister of the Interior stated that the 'number of Armenians deported from Diarbekir amounted to 120,000', and that 'every Muslim who tries to protect Armenians will be hanged in front of his house, and his house will be burned down'.[21] Governors were instructed to implement the orders without question. Those who refused were demoted.

[15] Hovannisian, above n 15.

[16] See Dadrian, 'The Documentation of the World War I Armenian massacres', above n 14, 550.

[17] Robert Melson, 'Provocation or Nationalism: A Critical Inquiry into the Armenian Genocide of 1915', in R.G. Hovannisian (ed), *The Armenian Genocide in Perspective* (New Brunswick and London: Transaction Publishers, 1986).

[18] Richard G. Hovannisian, 'The Armenian genocide', in Israel W. Charny (ed), *Genocide: A Critical Bibliographic Review* (New York, NY: Facts on File Publications, 1991), 95; Vahakn N. Dadrian, 'Documentation of Armenian Genocide in Turkish Sources', in Israel W. Charny (ed) *Encyclopedia of Genocide*, Vol 1 (Santa Barbara, CA: ABC-CLIO, 1999), 94.

[19] Hovannisian, above n 19, 95.

[20] See Vahkhn N. Dadrian, 'The Role of Turkish Physicians in the World War One Genocide of Ottoman Armenians', *Holocaust and Genocide Studies*, *1* (1986), 169–92.

[21] Cited in John S. Kirakossian, *The Armenian Genocide*, above n 11, 169.

An estimated 1.2 million Armenians (which included also the Assyrians and Pontiac and Anatolian Greeks) were killed from 1915–1918. Henry Morgenthau, the American Ambassador at the time, wrote: 'I am confident that the whole history of the human race contains no such horrible episode as this. The great massacres and persecutions of the past seem almost insignificant when compared to the sufferings of the Armenian race in 1915.'[22]

Law was a partner to this destruction. The Temporary Law of Deportation, *Sevk ve İskân Kanunu*, was drafted in May 1915 to legitimize the deportations of the Armenians. This use of law is interesting, in that while the Deportation Law was drafted after the deportations had begun, it was still seen as important to have legislation to authorize it. Using *the* term 'deportees' rather than 'Armenians', the law was deliberately not introduced to Parliament and instead ratified by the Grand Vizier and Cabinet.[23] In the subsequent Courts-Martial, the verdict against the 'Responsible Secretaries and Delegates' found that the deportations were 'exploited as a pretext for personal gain' (in that they gained access to Armenian property) and that '[t]he deportation was carried out in a manner [so as] to include every part [of the country], in contradiction to the spirit behind the wording of the Law on Deportation'.[24] Law thus, while a tool of the genocide, was still designed to set limits.

The following year a law to allow the release of prisoners to serve in the Special Organization Unit, the group responsible for much of the killing, was rushed through Parliament—yet the prisoners had already been released and most of the killings completed.[25] A law to authorize the confiscation and selling of Armenian property—the Temporary Law of Expropriation and Confiscation—was passed in late 1915 with one sole voice of opposition in the Senate, Senator Ahmed Riza, who stated that the law was 'inimical to the principles of law and justice'.[26]

These laws made the perpetration of this state crime 'allowable'.[27] They provided a framework of legitimation for persecution. It was a call to law, yet the genocide was not implemented through law—rather, law was used as a tool of legitimation, with the relevant legislation either passed after the event or not passed through the proper channels at all. It was only after the war that law came to play a far more important role—that of securing redress for a genocide that had been legitimized by the legal and political processes themselves.

[22] Henry Morgenthau, *Ambassador Morgenthau's Story* (London: Gomidas Institute, 1918), 321–2.
[23] On this, see Dadrian, *The History*, above n 13, 221.
[24] Dadrian and Akçam, *Judgment at Istanbul*, above n 13, 315–16.
[25] Dadrian, *The History*, above n 13, 236.
[26] Dadrian, above n 25, 223.
[27] See further, Jennifer Balint, *Genocide, State Crime and the Law: In the Name of the State* (London: Routledge-Cavendish, 2012), in particular Chapter 2.

(II) The Promise of International Proceeding

Any trials were supposed to be internationally driven. On 24 May 1915 the Allies (Britain, France and Russia) made the following joint declaration:

> In view of these new crimes of Turkey against humanity and civilisation, the Allied governments announce publicly . . . that they will hold personally responsible . . . all members of the Ottoman government and those of their agents who are implicated in such massacres.[28]

Several Articles stipulating the trial and punishment of those responsible for the genocide had been inserted into the Peace Treaty of Sèvres, signed on 10 August 1920. Article 144 stated that '[t]he Turkish Government recognises the injustice of the law of 1915 relating to Abandoned Properties (*Emval-i-Metroukeh*)' and outlined measures of restoration, Article 228 stated that '[t]he Turkish Government undertakes to furnish all documents and information of every kind, the production of which may be considered necessary to ensure the full knowledge of the incriminating acts, the prosecution of offenders and the just appreciation of responsibility', and Article 230 continued:

> The Turkish Government undertakes to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1914.
>
> The Allied Powers reserve to themselves the right to designate the tribunal which shall try the persons so accused, and the Turkish Government undertakes to recognise such tribunal.
>
> In the event of the League of Nations having created in sufficient time a tribunal competent to deal with the said massacres, the Allied Powers reserve to themselves the right to bring the accused persons mentioned above before such tribunal, and the Turkish Government undertakes equally to recognise such tribunal.[29]

'Crimes against humanity' was the original charge, which was changed to massacres (it had been opposed by the US, who preferred 'crimes against the law of war', and Japan). Yet the court provided for in Article 230 of the Treaty of Sèvres—the Allies reserved 'the right to designate the tribunal which shall try the persons so accused'—never eventuated, and in fact the Peace Treaty of Sèvres was abandoned (signed but never ratified). There was even a provision for a court established by the League of Nations to be the designated tribunal. Article 230 of the Treaty bound Turkey to recognize its jurisdiction if the League 'created in sufficient time

[28] Cited in Dadrian, *The History*, above n 13, 216. The first draft, proposed by Russia, contained the phrase 'crimes against Christianity and civilisation', but it was changed to 'crime against humanity and civilisation' by France in light of the Muslim populations in the French colonies: see Ulrich Trumpener, *Germany and the Ottoman Empire* (Princeton, NJ: Princeton University Press, 1968), 210, fn 26.

[29] The Treaty Of Peace Between the Allied and Associated Powers and Turkey Signed at Sèvres, 10 August 1920, *Armenian News Network* [website], <http://www.groong.com/treaties/sevres.html> (accessed 27 February 2013).

a tribunal competent to deal with the said massacres'. Yet this international court was not established.

Taner Akçam notes that 'the Allied Powers tied the terms of the peace treaty to the Ottoman government's attitude toward punishing the perpetrators of the massacres'.[30] In fact, there was a belief among the Allies that the Turkish nation as a whole should be punished—the British deputy high commissioner in Istanbul wrote in 1919 to the Paris peace conference:

> Punishing those responsible for the Armenian atrocities means punishing all Turks. That is why I propose that the punishment, on the national level, should be the dismemberment of the last Turkish Empire, and, on the individual level, putting on trial the senior officials on my list so as to make an example out of them.[31]

Accountability for genocide was, however, connected to Allied ambitions over the Ottoman state—for the Russians, claims over the Straits, and for the 'Great Powers' as a whole, the partitioning of Anatolia and a desire to 'throw the Turks out of Europe'.[32] Britain also felt a great deal of guilt towards the treatment of the Armenians, having withdrawn from an earlier agreement that would have seen the Armenian provinces put under Russian instead of Ottoman control.[33]

The successor to the Treaty of Sèvres, the Treaty of Lausanne, omitted all mention of war crimes.[34] Despite holding many indicted war criminals hostage on the islands of Mudros and Malta, allegedly for their safety, the British held no trials. There had been great public outrage in Britain as to the treatment of the Armenians, with calls for trials to be held. The British had begun arresting Ottoman officials and suspected war criminals, together with giving lists of suspects to be arrested to the Ottoman authorities.[35] Yet Turkish opposition to Ottoman nationals being tried before foreign courts led to the cessation of any British trials (together with a concern that there was insufficient documentary evidence to convict). The prisoners were handed back to Turkey in October 1921 after a promise by the Kemalist government that they would be tried. As Akçam notes, however, 'most of them moved to Ankara and were given posts in the nationalist government'.[36] The British Foreign Secretary, Lord Curzon, was to write in 1922, 'I think we made a great mistake in ever letting these people out. I had to yield at the time to a pressure which I always felt to be mistaken.'[37]

Despite a beginning that saw the Allies boldly proclaim they would 'hold personally responsible…all members of the Ottoman government and those of their agents who are implicated in such massacres', and recognition of the massacre of the Armenians at the Paris Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, no international or Allied trials were held. Legal proceedings convened by the British concerned not the killings of the Armenians, but atrocities committed against British soldiers. The irony of the

30 Akçam, above n 13, 215.
31 Cited in Akçam, above n 13i, 216–17.
32 Akçam, above n 13, 211–13.
33 See Akçam, above n 13, 233–4.
34 Willis, above n 13, 162.
35 See Akçam, above n 13, 239.
36 Akçam, above n 13, 362.
37 Cited in Willis, above n 13, 163.

original Allied declaration is thus that with the defeat of Turkey, the end of World War I, Turkey's signing of the Armistice on 30 October 1918, and the cessation of the genocide against the Armenians, it was not the Allies who initiated legal proceedings against the perpetrators of the genocide, but the Turks themselves. In fact, the Ottoman state had begun this process already.

(III) Establishing the Courts-Martial

The process of establishing a legal process of accountability to address the crimes perpetrated against the Armenians began in the Ottoman Parliament. This was in part due to the public outcry at the escape from Istanbul on 1 November 1918 of seven key leaders of the Young Turks (Mehmed Talât, Ismail Enver, Ahmed Cemal, Drs Mehmed Nazim and Behaeddin Şakir) and police and security chiefs Osman Bedri and Hüseyin Azmi. As Kirakossian notes, based on records of speeches printed in *Takvim-i-Vekâyi*, in the aftermath of the Armistice signed on 20 October 1918, 'the Armenian massacres became the primary topic of conversation in the Ottoman Parliament', with one parliamentarian decrying '[w]e inherited a country turned into a huge slaughterhouse'.[38]

On 2 November 1918, a motion for a trial of the ministers of the two wartime cabinets was introduced by a Deputy in the Chamber of Deputies of the Ottoman Parliament, invoking 'the rules of law and humanity'.[39] The motion included as an attachment ten charges against the ministers, including aggression, military incompetence, political abuses, and economic crimes. Charges No. 5 and No. 10 related to the killings of the Armenians. No. 5 challenged the enactment of the Temporary Laws, with their associated 'orders and instructions' and subsequent 'disasters' being 'completely contradictory to the spirit and letter of our Constitution'. Charge No. 10 indicted the ministers for the creation of 'brigands [*çetes*] whose assaults on life, property and honour rendered the ministers guilty as co-perpetrators of the tragic crimes that resulted'.[40]

At the same time, the upper chamber of the Ottoman Parliament, the Senate, began debating the matter of investigating and prosecuting the wartime crimes. A motion was submitted by General Çürüksulu Mahmud, former minister of Public Works, who proposed in subsequent debate that investigation of the abuses be related to 'the conduct of internal affairs policy (*dahiliye siyaseti*) and governance'.[41] This tension between a focus on 'bad governance' and on the massacres themselves was to continue throughout the trials. The Ittihad was blamed for 'hurting the interests of the nation and the country' and, with the Armenians now pushing for independence, 'for the wrong done to the integrity of the Ottoman Empire'.[42]

[38] Kirakossian, above n 11, 160, 162.
[39] Dadrian, *The History*, above n 13, 319.
[40] Dadrian, *The History*, above n 13.
[41] Dadrian, *The History*, above n 13, 337, fn 11.
[42] Session of Military Tribunal 8 March 1919, cited in Kirakossian, above n 11, 171.

Two inquiries were subsequently established in late November 1918: the Fifth Committee of the Ottoman Chamber of Deputies (*Beşinci ube Tahkikat Komisyonu*) and what was known as the Mazhar Inquiry Commission, headed by Hasan Mazhar.[43] The Fifth Committee conducted hearings, during which ministers were interrogated. It also gathered key documents that demonstrated the collusion between the military and the executive in the genocide of the Armenians.[44] The Mazhar Commission was established by the Sultan and charged with investigating the conduct of government officials. It gathered key documents, in particular telegraphic orders from twenty-eight provinces identified as centres of deportations and massacres.[45] As Kevorkian notes, 'Hasan Mazhar sent an official circular to the provincial prefects and sub-prefects, demanding the originals or certified copies of all orders received by the local authorities in connection with the deportation and massacre of the Armenians'.[46] Local inquiry commissions were also established to aid regional trials. The results of all investigations were provided to the Courts-Martial.

(IV) The Ottoman State Special Military Tribunal

The Courts-Martial were established by Imperial authorization on 14 December 1918. Tribunals around the country were to be established 'in accordance with the *Regulations on Martial Law* of 20 September 1877'.[47] On 8 January 1919, the Extraordinary (or Special) Courts-Martial were declared operational.[48] By mid-January 1919, the Mazhar Inquiry Commission forwarded 130 separate dossiers of suspects to the Courts-Martial. Its recommendation, following the Criminal Procedure Code, was that the evidence was incriminating enough to warrant the commencement of criminal proceedings against the suspects.[49] The tribunal began its work on 12 February 1919. On 8 March 1919, the statute of the new Courts-Martial was introduced.[50]

43 Mazhar had been the governor of Ankara who had been dismissed from his position in 1915 for refusing to obey Talat's orders to deport the Armenians: Session of Military Tribunal 8 March 1919, cited in Kirakossian, above n 11, 160.

44 See further, Raymond Kevorkian, *The Armenian Genocide: A Complete History* (London and New York, NY: I.B. Tauris, 2011), 725–33.

45 See further Kevorkian, above n 44, 735–8.

46 See further Kevorkian, above n 44, 4.

47 Dadrian and Akçam, *Judgment at Istanbul*, above n 13, 254.

48 According to Kevorkian, three courts-martial were established in Istanbul, as well as in ten jurisdictions in the provinces. In Istanbul, Court-Martial 1 tried people accused of committing crimes against the Armenian population, Court-Martial 2 specialized in cases involving the illegal seizure of assets, and Court-Martial 3 judged senior officers: Kevorkian, above n 44, 739–40.

49 Dadrian, *The History*, above n 13, 320–1.

50 There was debate in the Parliament, the press, and during the first two sittings of the military tribunal, as to whether the defendants should be prosecuted before the High Court, before the Military Tribunal, or regular criminal courts. It was concluded that as martial law as implemented by the Ittihadists on 12/25 April 1909 was still in force (and according to Article 113 of the Ottoman Constitution this meant that civil laws are suspended), the Courts-Martial were the only option.

During its life the Courts-Martial underwent a number of changes: from a military-civilian to a military Courts-Martial, as well as changes to its staff, including a high turnover of judges.[51] Grand Vizier Damad Ferid had put forward a proposal to include the participation of the neutral governments of Spain, Switzerland, Netherlands, Sweden and Denmark in the prosecution. This was not accepted, and in March 1919, the Courts-Martial went from being a military-civilian to a strictly military Courts-Martial.

The basis of legal proceedings was Ottoman law. The Courts-Martial prosecutors relied on the Ottoman Penal Code for the charges. The key charge was 'deportation and massacre'. Although the charges came from the existing Penal Code, their application (to the charge of massacres of the Armenians) was new. One of the Courts-Martial's chief aims was to establish the systematic manner in which the massacres of the Armenians took place, and to allocate institutional (primarily to the Ittihad Party) as well as individual responsibility. This is reflected in the organization of the trials. The indictment emphasized that 'the investigation of massacres and illegal, personal profiteering, is the principal task of this Tribunal'.[52] The main indictment as read by the Ottoman Attorney-General stated in part:

> The principal subject matter of this investigation has been the event of the disaster befalling the deported Armenians—an event which occurred at various times and places. Legal steps are now being taken against individuals responsible for that occurrence. The disaster visiting the Armenians was not a local or isolated event. It was the result of a premeditated decision taken by a central body composed of the above-mentioned persons; and the immolations and excesses which took place were based on oral and written orders issued by that central body.[53]

The Ottoman State Special Military Tribunal focused on the massacres of the Armenians as well as on 'illegal, personal profiteering' and Turkey's entry into the war. The charges of 'overthrow of the government' (added in April 1920), and 'rebellion' and 'violation of public order' were also included. Documents found by the investigatory Commissions, and the Courts-Martial, in particular coded telegrams sent by the main defendants outlining the actions to be taken against the Armenian population, were used as key evidence. Importantly, the trials were established and conducted around the view that the Armenians had been intentionally massacred. As noted by Dadrian, in all its verdicts, the Courts-Martial 'sustained the charges relating to the destruction of the Armenians, pointing to evidence on "the organisation and implementation of the crime of murder (*taktil cinayeti*), by the leaders of Ittihad. This fact has been proven and verified (*tahakkuk*)" '.[54]

In fact, the court in the Yozgat trial rejected the Attorney-General's wish to prosecute the accused under Article 56 of the Ottoman Penal Code, which pertains

[51] See Dadrian, above n 8, 31–2.

[52] *Takvimi Vekâyi*, No. 3540, cited in Dadrian, *The History*, above n 13, 324.

[53] H.K. Kazarian, 'Turkey Tries its Chief Criminals: Indictment and Sentence Passed Down by Military Court of 1919', *The Armenian Review*, *24* (1971), 10.

[54] *Takvimi Vekâyi*, No. 3604, cited in Dadrian, 'The Documentation of the World War I Armenian Massacres', above n 13, 556.

to ethnic or other groups pitted against each other in mutual slaughter.[55] It used instead Article 45, which distinguished between victims and perpetrators.[56] Höss notes that not only did this preclude the prosecution of the general civilian population of Yozgat, but it demolished the myth that the Armenians were involved in an insurgency and that the massacres could be classified within the context of justifiable civil war.[57]

(V) The Operation of the Trials

The main trials were held in the building of the Ottoman Parliament in Istanbul, in the Great Hall of the Ministry of Justice. The official government gazette, *Takvim-i-Vekâyi*, published extracts daily and the proceedings, unusually, were public, in order, according to the presiding judge, 'to demonstrate the intent of the Court to conduct the trials impartially and in a spirit of lofty justice [*kemali adil ve bitaraf*]'.[58] He continued: 'The court is simply trying to help the defendants and facilitate their defence.'[59]

Original estimates were that twenty-four trials were held; however, this has now been revised to at least sixty-three trials—with only some reported.[60] Over 200 files had been prepared on individuals—government, military and Party officials alleged to be participants in the genocide—creating, together with the trial records, a substantial documentary record of the genocide. There were four main series of trials, within the framework of the Courts-Martial:

- Ittihadist leaders and Central Committee members;
- Ministers of the two wartime cabinets (these first two were merged after the sixty-three prisoners were taken by the British to Malta and Mudros in May 1919);
- Responsible Secretaries and Delegates (who organized and supervised deportations) and those of the 'Special Organization' (who did the killings); and
- Officials in provinces where the massacres took place.

[55] The claim by the Prosecutor that the Armenians bore guilt for the treatment they received resulted in the walking out of the three Armenian lawyers representing the victims: Dadrian, above n 9, 34–5.
[56] Dadrian, above n 9, 39.
[57] See Höss, above n 11, 220.
[58] *Takvimi Vekâyi*, No. 3540, cited in Dadrian, *The History*, above n 14, 322. This was to later change.
[59] Dadrian, 'The Documentation of the World War I Armenian massacres', above n 13, 555.
[60] See Dadrian and Akçam, *Judgment at Istanbul*, see above n 13, 202. Akçam notes that while twelve of the trials were documented in *Takvim-i-Vekâyi*, these were recorded in different ways—some were complete or partial records of the trials such as the indictments, minutes and verdicts, and others solely through the Sultan's confirmation of the Court's sentence: Akçam, above n 13, 288. It also appears that there were a number of military tribunals operating at the same time in this early stage—necessitating that the main Tribunal, responsible for the 'deportation cases', be known as the 'First Military Tribunal': Akçam, above n 13, 285.

There were further trials ready to proceed, yet with the rise of the Nationalist Movement and the challenge to the Grand Vizier, these were abandoned. While some proceedings were *in absentia*, many indicted persons were present for the trials.

The Courts-Martial prosecutions focused on three classes of perpetrators:

- The organizers of the genocide;
- Those who carried out the perpetration in the provinces; and
- Those involved in what were termed 'economic crimes'.

Within those responsible for the genocide, the defendants were classified as either principal co-perpetrators (cabinet ministers, leaders of the Ittihad Party, Responsible Secretaries) or accessories (those who carried out the massacres, namely in the provinces).[61] The series of trials that focused on the Ittihadist leaders, Central Committee members, and ministers of the two wartime cabinets is known as the Key Indictment, and ran from 28 April 1919 until 5 July 1919. This indictment of 'principal co-perpetrators' focused on the ministers of the two wartime cabinets and the leaders of the ruling Ittihad Party: Enver, Cemal and Talat. The indictment also focused on institutions: the Ittihad Party (particularly its Central Committee—namely Drs Nazim and Şakir), the General Assembly, and the two provincial control groups. The Defence Ministry, the War Office (particularly the Special Organization), and the Interior Ministry were also targeted. The Young Turk Ittihad Party's objectives and methods were declared criminal by the Procuror-General.[62] Dadrian notes that in this series of trials 'the Court considers the investigation of these deportations and massacres as its "integral task" and not only premeditation and decision-making, but the organization, supervision, control, and implementation of genocide'.[63] Further, it highlighted the secretive nature of the decision-making process, and 'asserted that the deportations and massacres constituted a comprehensive attempt to radically solve the Armenian question (*hall vefasl*)'.[64] Those on trial were shown to have operated both as cabinet ministers as well as being involved in directing the genocide.

The Indictment was also amended. According to Dadrian:

> It refers to the crimes of 'massacre', 'plunder of properties', 'torching of corpses and buildings', 'rape', and 'torture and torment'. The amendment also charges that these crimes were committed 'in a particularly organised way... in the capital and in the provinces... repeated'. The preamble to the new indictment speaks of 'the extermination of an entire people constituting a distinct community', and of 'the admission and confession' of the defendants (*kabul ve itiraf*).[65]

Judgment in the Key Indictment was handed down on 5 July 1919. The Court found the cabinet ministers guilty both of orchestrating the entry of Turkey into World War I and of committing the massacres of the Armenians. Former leaders Talat, Enver, Cemal, Dr Nazim (and Dr Behaeddin Şakir in a separate prosecution on 13 January 1920) were found guilty of 'first degree mass murder'[66] and given the

[61] Dadrian, *The History*, above n 13, 327. [62] Dadrian, *The History*, above n 13, 323.
[63] Dadrian, above n 8, 44. [64] Dadrian, above n 8, 44–5.
[65] Dadrian, above n 8, 46. [66] Dadrian, above n 8, 50.

death penalty *in absentia*.[67] Other ministers were given prison sentences, including the former economics minister, and the former commerce and agriculture minister who received sentences of fifteen years each.

The Responsible Secretaries trial ran from 21 June until 13 July 1919, with thirty defendants. These were the officials of the Ittihad party who had organized the deportations. The majority had evaded arrest, with only eleven of the indicted on trial, and eighteen absent. The trial also included other officials. As Dadrian writes:

> The centrepiece was the accusation that the defendants had gained control of the state apparatus and imposed upon the government their party objectives. They treated the Central Committee as the supreme instance for governmental decision-making. The special law on deportation was the result of this procedure. The deportees were 'annihilated' (*imha*) and their goods and properties 'plundered and pillaged' (*nehb u garet*) by brigands and gangs of outlaws engaged (*terib*) for this purpose.[68]

It is in the trial of the Responsible Secretaries that the meaning of the Deportation Law was most clearly demonstrated. The verdict found that the Responsible Secretaries 'used the May 14/27, 1915 Temporary Deportation law…to perpetrate…massacre, plunder of goods, appropriation and hoarding of riches'.[69] The verdict also found, as Dadrian relates:

> The massacre and destruction of the Armenians and the pillage of their goods [were] organised and set in motion (*tertip ve ihzar*) by these Responsible Secretaries and Delegates. They relied on and engaged criminal gangs and mobs. Some of them tricked the victims and managed to appropriate their abandoned goods after pretending to be helping them.[70]

Yet the officials were viewed by the Court as 'accessories to the crime' and escaped any death penalty, with most found guilty of 'robbery, plunder, and self-enrichment at the expense of the victims'.[71]

Trials that focused on the provinces were those of Trabzon,[72] Yozgat, Harput, Erzincan, Bayburt, and Mosul.[73] Other locational trials were being prepared when the Courts-Martial was dismantled, including those for atrocities against Armenians in Adana, Aleppo, Bitlis, Diarbekir, Erzerum, Marash, and Van.[74] Three individuals were executed—all came from the trials of officials in provinces where the massacres took place. These were Nusret Bey, the Governor (Prefect) of Urfa, sentenced to death on 20 July 1920, Abdullah Avni, the officer in charge of the Erzincan gendarmery, executed on 22 July 1920, and Kemal Bey, district governor of Yozgat, executed on 10 April 1919.

Prior to the trials of the Ittihadist leaders, government ministers and Responsible Secretaries, the local officials responsible for the deportation in the district of Yozgat,

[67] Willis, above n 13, 156. In 1921, Talat was assassinated in Berlin—in his defence, the perpetrator Soghomon Tehlirian argued that he had been sentenced to death *in absentia* by the Tribunal: Kirakossian, *The Armenian Genocide*, above n 11, 171.

[68] Dadrian, above n 8, 42.

[69] Dadrian, above n 8, 43.

[70] Dadrian, above n 8, 43–4.

[71] Dadrian, above n 8, 44.

[72] For a discussion of this trial, held between 26 March and 17 May 1919, see Dadrian, above n 8, 39–42.

[73] For an account of these trials see Kevorkian, above n 44, 791–5.

[74] Höss, above n 11, 210.

were put on trial. This was the first trial held by the Courts-Martial in Istanbul. In this district, which comprised the counties of Bogazhyan, Akdag Madeni and Yozgat, 31,147 of a total pre-war Armenian population of 33,133 in Yozgat district, who lived mainly in villages, were 'deported'.[75] Dadrian notes that 'at the first trial of the series (February 5, 1919), the Attorney General disclosed that out of about 1,800 Armenians from the town of Yozgat proper, only eighty-eight survivors could be counted'.[76]

The Yozgat Officials trial ran from 5 February to 7 April 1919, in eighteen sittings. Mehmed Kemal (Kemal Bey), Mehmed Tevfik and Abdul Fayaz—all officials from Yozgat—were indicted. They were accused of the 'mass murder of Yozgat's Armenian deportees at Keller and elsewhere, the pillage and plunder of the victim's goods, and the abduction and rape of many members of the convoys'.[77] The offences, notes Höss, were termed 'anti-human'.[78] One witness spoke of 'doing government business'.[79] The Court heard testimony and received affidavits from Muslim leaders from the district as to the horrific means by which the Armenian population was slaughtered.[80] They also heard from eighteen Armenian survivors. In an affidavit from Major Mehmet Salim, the Military Commandant of Yozgat, requested by the Mazhar Inquiry Commission, the point was stressed that 'underlying the entire scheme of deportations lay "a policy of extermination" (*imha siyaseti*)'.[81] The verdict emphasized that '[t]heir handwritten documents confirm the nature of the real purpose of these guards [the so-called escorts of the deportee convoys]—the massacre of the people of these convoys'.[82] In his analysis of the judgment, Dadrian writes:

> Perhaps the most important feature of the Verdict was its conclusion that the deportations were a cloak for the intended massacres. 'There can be no doubt and no hesitation' on this point, it declared in that conclusion (*şüphe ve tereddiit birak- madigindan*).[83]

On 8 April 1919 Mehmed Kemal, who had been sub-district governor of Bogazliyan and subsequently interim district governor of Yozgat, was convicted of ordering the robbery and murder of Armenians and sentenced to death under Article 170 of the Ottoman Penal Code, which prescribes death for the crime of premeditated murder. His sentence was carried out in Istanbul's Beyazit Square on 10 April 1919.[84]

While there had been public statements in the Parliament and the media as to the nature of the massacre of the Armenians, and condemnation of it, the wider population seemed reluctant to accept the legal process and its verdicts.[85] This reflected the

[75] Dadrian, above n 8, 33. [76] Dadrian, above n 8, 33. [77] Höss, above n 11, 213.
[78] Höss, above n 11, 213. [79] Höss, above n 11, 220. [80] See Dadrian, above n 8, 36–8.
[81] Dadrian, above n 8, 37. [82] Höss, above n 11, 218. [83] Dadrian, above n 8, 39.
[84] Mehmed Tefkik was sentenced to fifteen years' hard labour as an accessory. Abdul Fayaz had earlier been removed from the trial for a proposed second Yozgat trial—released on bail, he had escaped to join the Kemalists in the interior and later became a deputy in the Grand National Assembly: Höss, above n 11, 218.
[85] Höss relates that due to the public unwillingness to accept Armenian testimony during the Yozgat trial, in his closing arguments the Prosecutor-General told the court that he was intentionally excluding all evidence supplied by Armenian witnesses, and was concentrating on documentary evidence and evidence supplied by former government officials: Höss, above n 11.

schism in the Ottoman state between support for the Ittihad party and the desire to create distance from it and its actions. The execution and subsequent funeral of Mehmed Kemal turned into a large-scale nationalist demonstration, where anti-British and anti-occupation slogans were heard, and wreaths reading 'Kemal Bey, the Great Martyr of the Turks' were laid, and after which 20,000 Turkish pounds were raised for his family.[86]

(VI) The Record of the Trials

While short lived, these trials created an important legacy for the prosecution of genocide and, critically, provided a further source of documentation on the genocide of the Armenians. The trials also reflected on a state's own acts against its civilians, and ones it had not usually protected. As Dadrian notes, '[f]or the first time, Ottoman-Turkish authorities of the highest rank were being held accountable for their crimes against these [non-Muslim] nationalities'.[87]

There is, in these trials, an official acknowledgement of the harms perpetrated. The indictment began: 'The principal subject matter of this investigation has been the event of the disaster befalling the deported Armenians—an event which occurred at various times and places.'[88] The Courts-Martial subpoenaed documents that provided evidence of the policy to annihilate the Armenians as a people, and of the chain of command that implemented this policy. It was this evidence of *state* crime that makes these trials so important as a record; the trials demonstrated how the genocide of the Armenians was a coordinated and deliberate policy of the ruling Young Turks. As Kirakossian outlines, 'the most important conclusion arrived at as a result of the investigation [by the Courts-Martial] was that the crimes inflicted upon the Armenians in various places and at various times, were not isolated events'.[89]

The trials also showed how this policy was transmitted to the provinces by Talat, Enver and Kemal through telegram orders, and how what was known as the 'Special Organization', the *Teshkilat-i Mahsoosé*, was specifically established to carry out the massacres. These included, outlined in the indictment, a telegram sent by Talat to the administrative heads of provinces where Armenians were massacred, ordering that 'the bodies of the dead remaining on the roads not be thrown into ravines, rivers or lakes, and instead be interred and their remaining possessions burnt'.[90] A further telegram sent by Behaeddin Şakir to Sabit Bey, Governor-General of the vilayet of Kharput, reads as follows: 'Are the Armenians shipped from there exterminated? And are the dangerous persons about whose deportation you have informed me indeed been destroyed or simply deported? My brother, give me accurate information'.[91]

[86] Höss, above n 11, 219; Akçam, above n 12, 293. The new Kemalist government later erected a statue in the public square of Bogazhyan.
[87] Dadrian, above n 8, 30.
[88] Kazarian, above n 53, 10.
[89] Kirakossian, *The Armenian Genocide*, above n 11, 168.
[90] Kirakossian, 169; Dadrian and Akçam, *Judgment at Istanbul*, above n 13, 277.
[91] Dadrian and Akçam, *Judgment at Istanbul*, above n 13, 168.

Evidence gathered by the Courts-Martial pointed to clear coordination and intent. At the Yozgat trial, in a session on 22 February 1919, the prosecutor introduced twelve cipher telegrams that demonstrated the word 'deportation' meant 'massacre'.[92] According to Dadrian, '[t]his critical piece of evidence was confirmed by Colonel Halil Recayi, who during the course of his testimony at the 7th sitting (February 18) explicitly admitted that he had received from Colonel Şahabeddin cipher telegrams about the killing operations and that "deportation" in fact meant "massacre" (*kesim*)'.[93] Dadrian records that '[t]he testimony of Colonels Şahabeddin and Recayi, and others, the Attorney General concluded, confirmed the organised nature of the Yozgat mass murder'.[94]

The Key Verdict against the cabinet ministers and CUP leaders found that:

> The evidence shows that the crimes of massacre which occurred in Trabzon, Yozgad, and Boğazlıyan, and which were verified as a result of the trials that were held in the Military Tribunal, were ordered, planned and carried out by persons found among the leadership of the CUP. Furthermore, as was presented during the defence['s case], [although] there were those who became aware of the crimes after their occurrence, the[-se persons] made no effort whatsoever to prevent their repetition or stop the perpetrators of the previous crimes.[95]

The indictment, based on the documentary evidence the Courts-Martial had already received from the investigating committees, stated, in part:

> July 1914 . . . immediately after the military movements Talaat, Enver and Jemal put their secret plans into operation. They formed *Teshkilat-i Mahsoosé* composed of criminals released from jail who constituted the 'core of the gang acting on special orders and instructions'. Prior to the mobilisation it was rumoured that the gangs were to participate in the war . . . However, there is incontrovertible evidence that they were formed to massacre the Armenians [*Takvim-i-Vekâyi*, April 2, 1919, N 3604].[96]

The Tribunal also identified isolated incidents where the orders were disobeyed, as with the case of Mazhar Bey, the vali of Ankara who replied to orders from Atif Bey, 'No, Atif Bey, I am a governor, not a criminal. I give you my post, execute it yourself.'[97] The trials showed the consequences of disobedience—as noted by Dadrian, in the trial of the Responsible Secretaries, 'in at least three cases provincial Responsible Secretaries had been able to effect the dismissal of governors who resisted orders for massacres', with one denounced as 'the protector of the Armenians, or more accurately . . . the governor-general of the infidels'.[98]

Many documents, however, were destroyed. Kirakossian relates that 'in the course of the investigation [by the Courts-Martial] it became obvious that most important material of the activity of the [Special] Organization and all the documents of the

[92] Dadrian, above n 8, 35. [93] Dadrian, above n 8, 35. [94] Dadrian, above n 8, 35.
[95] Dadrian and Akçam, *Judgment at Istanbul*, see above n 13, 327.
[96] Cited in Dadrian and Akçam, *Judgment at Istanbul*, see above n 13, 166.
[97] Dadrian and Akçam, *Judgment at Istanbul*, see above n 13. Mazhar was to later head up the Commission established by the Sultan to initiate investigations into the genocide.
[98] Dadrian, above n 8, 43.

Central Committee had been stolen'.[99] Documents were burned and taken out of Turkey.[100]

(VII) Acknowledgement of Genocide

In the official indictment and the mandate of the Courts-Martial there is clear acknowledgement of the planned massacres of the Armenians. This acknowledgement was supported by media and parliamentary debate at the time. As Kirakossian notes, with the signing of the Armistice and the resignation of Talat Pasa's government, 'criticism of the Young Turks became the chief theme in the Turkish press'.[101] One newspaper, *Inkilab*, demanded the dissolution of the Majlis, the Parliament: 'It is impossible to appear before humanity and civilization hand in hand with those who had worked with the organisers of the Armenian massacres'.[102] Another, *Sabah*, wrote:

> There is no way to renounce the reality we face today, a reality of endless misery and wretchedness. The government of Said Halim and Talaat nursed in their accursed hearts a horrible plan: using the excuse of war to deport the Christians, and especially the Armenians, from one province into another, to the Arabian desert, and in the course of deportation with unspeakable, cannibalistic methods not even known in the middle ages or in the centuries that followed murder not only grown-up men or boys of tender years, but also infants, women, old men—to finally destroy and extinguish the Armenian race…Talaat Bey, Minister of the Interior, gives orders and instructions from the Centre, organises gangs and sends them to the provinces. The Ittihad Centre sends its members like Drs Nazim and Shakir to Erzerum, Trebizond and other places as extraordinary plenipotentiaries to confer with Hasan Tahsim and Jemal Azmi. As a result—outrages, methodically planned atrocities and massacres conducted with the assistance of lawless elements and criminals specially released from jail for the purpose.[103]

With the establishment of the main trial, there was, as Dadrian and Akçam relate, intense press coverage: 'headlines in the Turkish press included such terms as "Historical Day", "Historical Judgment", and "Incredible Indictment" '.[104]

Immediately post-war, there was clear recognition of what had been done to the Armenians. At the end of the war, in his opening speech to the Ottoman Senate on 19 October 1918, the President, Senator Ahmed Riza, invoked the memory of 'the Armenians who were savagely murdered'.[105] Two days later, when challenged on this, he described the mass murder of the Armenians as an 'officially' (*resmen*)

[99] Kirakossian, *The Armenian Genocide*, above n 11, 168.

[100] See further, Taner Akçam, 'The Ottoman Documents and the Genocidal Policies of the Committee of Union and Progress (Ittihat ve Terakki) toward the Armenians in 1915', *Genocide Studies and Prevention*, *1* (2006), 129–32.

[101] Kirakossian, *The Armenian* Genocide, above n 11, 161.

[102] 6 November 1918, cited in Kirakossian, above n 101, 158.

[103] 28 November 1918, cited in Kirakossian, above n 101, 158–9.

[104] Dadrian and Akçam, *Judgment at Istanbul*, above n 13, 203.

[105] Dadrian, 'The Documentation of the World War I Armenian Massacres', above n 13, 110.

sanctioned 'state' crime (*devlet eliyle*) requiring 'some kind of intervention' by the authorities.[106] This recognition even extended to when the Kemalists came into power, once the Courts-Martial had been dissolved.

The testimony recorded in the transcripts of these trials provides an important record of state complicity in the genocide of the Armenians. These corroborate eyewitness testimony from consular officials present in Turkey during the war. US Ambassador Henry Morgenthau noted in his memoir the candid conversations that Turkish officials had with him:

> The real purpose of the deportation was robbery and destruction; it really represented a new method of massacre. When the Turkish authorities gave the orders for these deportations, they were merely giving the death warrant to a whole race; they understood this well, and in their conversations with me, they made no particular attempt to conceal the fact.[107]

German Ambassador Metternich wrote in a dispatch in July 1916, one of many written by the three German Ambassadors in Turkey throughout the war, despite their military allegiance: 'The Turkish government inexorably carried out her plans, namely, the resolution of the Armenian question through the destruction of the Armenian race'.[108] The former Italian Consul-General in Trebizond, one of the sites of the genocide, wrote of:

> the ruthless searches through the houses and in the countryside; the hundreds of corpses found every day along the exile road; the young women converted by force to Islam or exiled like the rest; the children torn away from their families or from the Christian schools, and handed over by force to Moslem families, or else placed by hundreds on board ship in nothing but their shirts, and then capsized and drowned in the Black Sea and the River Deyirmen Deré—these are my last ineffaceable memories of Trebizond, memories which still, at a month's distance, torment my soul and almost drive me frantic.[109]

American media reports of the massacres occupied the front page in the *New York Times* and other newspapers.[110] The German missionary, Dr Johannes Lepsius, who was present in Turkey as head of the Deutsche Orient-Mission from 1915 until 1917, documented the genocide, publishing a confidential albeit circulated report that gathered together eyewitness accounts. Historian Arnold Toynbee observed, in the Blue Book account published by the British government in 1916, organized by member of the House of Lords Viscount Bryce and based on eyewitness accounts, '[i]t was a deliberate, systematic attempt to eradicate the Armenian population throughout the Ottoman Empire, and it has certainly met with a large measure of success'.[111] Statements of the atrocities perpetrated based on eyewitness

[106] Dadrian, above n 13, 110. [107] Morgenthau, above n 22, 309.

[108] Cited in Dadrian, 'The Documentation of the World War I Armenian Massacres', above n 13, 568. Dadrian documents the extensive communication by the consular community during this period.

[109] Arnold Toynbee, *The Treatment of the Armenians in the Ottoman Empire*, cited in Leo Kuper, 'The Turkish Genocide of Armenians, 1915–1917', in Hovannisian (ed) *The Armenian Genocide in Perspective* (New Brunswick and London: Transaction Publishers, 1998), 49.

[110] See Marjorie Housepian Dobkin, 'What Genocide? What Holocaust? News from Turkey, 1915–1923: A Case Study', in Richard G. Hovannisian (ed), *The Armenian Genocide in Perspective* (New Brunswick and London: Transaction Publishers, 1998), 97–109.

[111] Toynbee, 1916, cited in Melson, 'Provocation or Nationalism', above n 17, 64.

accounts of many diplomats stationed in Turkey at the time can also be found in government archives.[112]

Yet with the political turmoil in the wake of the war, and the eventual change of government, this acknowledgement turned to denial. The authoritative voice of law was subverted. Those convicted were held up as martyrs. What had the potential to shape the nation turned into a different kind of nation building. New borders of memory were established, and the past thereby eliminated. It was a failed foundational moment.

(VIII) Political Context of the Trials

The Courts-Martial operated in a period of great internal turmoil. The Ittihad Party had been defeated, yet continued to operate insurgently. Further, the Civil Service and the Ministries of War, Interior and Justice, together with the offices of the Istanbul Police, were dominated by Ittihadists and actively impeded the work of the Tribunal, including aiding the escape of some prisoners.[113] The enthusiasm for holding the trials, and arresting suspects, was mixed. With one key escape early on in the trials, that of Dr Reşit Bey, who had been the governor of Diyarbekir and oversaw the deportation of the Armenians from that province, a special session of the Chamber was called. The President, Ahmet Riza Bey, convened the session in the upper house to debate 'the need for an Imperial Council to end government indolence, conduct a house-cleaning in the cabinet and give the Sultan some necessary warnings'.[114] Meanwhile, in some provinces, progress was slow, with one investigating magistrate in Trebizond noting in March 1919, '[n]one of my efforts and none of the work I did produced results'.[115]

The change of Grand Vizier from Tevfik Pasa to Damat Ferid Pasa sped up the trials. As Kevorkian notes, 'it was under his government that the Young Turks began to be called to account for their deeds, that arrests were made with greater and greater frequency, and that the Ittihadist organisations were challenged'.[116] More suspects were arrested (Ferid Pasa was more willing than his predecessor to accept lists of suspects from the British), and the first trial was concluded. The Grand Vizier was to declare that the government's aim was '[t]o show the Victorious Powers that we are opposed to the policies of the Union and Progress Party, to punish the war criminals, to eliminate some of those persons loyal to the CUP from the bureaucracy'.[117] There was also a sense that holding the trials was politically pragmatic. Internally, it

[112] See Donald E. Miller and Lorna Touryan Miller, *Survivors: An Oral History of the Armenian Genocide* (Berkeley, CA: University of California Press, 1993), 18–28.

[113] See Dadrian, above n 8, 31 and Dadrian, 'The Documentation of the World War I Armenian Massacres', above n 13, 555. Akçam notes as well that indicted persons were often informed of their impending arrest, allowing them time to escape: Akçam, above n 12, 291–2. Further, reports of conditions inside the jails where suspects were kept and a failure at times to arrest suspects showed a leniency given internally.

[114] Cited in Akçam, above n 12, 292.

[115] Cited in Kevorkian, above n 44, 741.

[116] Cited in Kevorkian, above n 44, 719.

[117] Cited in Akçam, above n 12, 293.

would further discredit the Ittihad Party, and externally, the Allies would perhaps see that responsibility lay with the Young Turk leadership, not the Turkish people as a whole. The newspaper *Alemdar* wrote:

> The only thing that would help us is to cry all over the civilised world that we will really and actually exercise justice over the guilty. If Baghdad Square will not witness the gallows of the criminals, then Paris [ie the Peace Conference] will become the place of judgement of our state and nation.[118]

In fact, Mehmed VI, the newly appointed Sultan after the war, had, in an interview with a British correspondent, specifically asked that the following statement be published: 'The great majority of the nation is entirely innocent of the misdeeds attributed to it. Only a limited number of persons are responsible.'[119]

In establishing the Courts-Martial, the Sultan's government had thus hoped that it would demonstrate that it was the Ittihadist Party, not the Turkish nation, that was responsible for the Armenian massacres, and that the Allies would be lenient at the Peace Conference.[120] It was therefore critical that the trials establish the systematic manner in which the massacres of the Armenians took place, and allocate institutional and as well as individual responsibility. The Courts-Martial also operated as an attempt at consolidation of power by the Sultan and of marginalization of the Ittihad Party.

Political instability continued throughout the duration of the Courts-Martial. Trials were halted on 17 May 1919 due to the Greek occupation of Smyrna and then resumed on 3 June. In the meantime, sixty-four prisoners were removed by the British to the islands of Mudros and Malta, and forty-one prisoners were released by the Ottoman government. The Kemalists, led by Mustafa Kemal who was to be the leader of the new republic of Turkey, were on the ascendancy, in part fuelled by events such as the occupation of the coastal port of Smyrna by Greece and the occupation of Istanbul by the British. Damat Ferid Pasa resigned in September 1919, resulting in a slower pace to the prosecutions again, with trials deferred, including a prohibition on Armenians returning to their former homes. When Parliament began sitting on 12 January 1920, almost all of the new deputies were connected to the emerging Nationalist Movement, leading to a strong challenge in Parliament to the trials.[121] In the face of this Nationalist challenge, and the inability of the Allies to proceed with partition, the British made the decision to occupy Istanbul, which they did on 16 March 1920. The Ottoman Parliament went into recess and a new Parliament was convened in Ankara, in direct challenge to the Ottoman Parliament and the leadership of Damat Ferid Pasa.[122]

[118] Cited in Kirakossian, *The Armenian Genocide*, above n 13, 172.
[119] Cited in Kirakossian, above n 11, 160.
[120] Dadrian, above n 8, 31.
[121] See Akçam, above n 12, 298–9.
[122] The government of Damat Ferid Pasa began handing the British names of the leaders of the Nationalist Movement, as well as putting on trial, through the Courts-Martial, leaders of the Nationalists—many were sentenced to death *in absentia*, including Mustafa Kemal, with four executed on 12 June 1920 for the attempted assassination of Damat Ferid Pasa. See Akçam, above n 12, 350.

(IX) Demise of the Courts-Martial

The ascendancy of Kemalism meant the demise of the Courts-Martial. With the Treaty of Sèvres and the occupation of Istanbul by the British, the Kemalists no longer tolerated the Courts-Martial trials. As Willis notes, the occupation by Greece of Smyrna on 15 May 1919 (allowed by the Council of Four) raised fears that the Allies favoured permanent territorial annexations by Greece, the ancient enemy of Turkey.[123] This further galvanized the Nationalist Movement led by Mustafa Kemal against the government of Damad Ferid. It is said to have led in part to the British taking those in custody to Malta. The Kemalists eventually overthrew the Sultan's government in October 1920 and ended the prosecutions for the genocide of the Armenians.

As the process of supplanting the Sultan's government and law proceeded, the Courts-Martial became irrelevant. The British occupation of Istanbul led to the end of Ferid's government and a stronger political centre in Ankara led by the Nationalists. On 29 April 1920, a bill was introduced in the new Kemalist National Assembly in Ankara to declare the official decisions and decrees of the Sultan's Istanbul government null and void. On 7 June 1920, the Ankara government enacted Law No. 7, which declared the Istanbul government, its treaties and agreements, invalid as of 16 March 1920, when the Allies formally occupied the city and assumed full control of it. On 11 August 1920, the new Kemalist government in Ankara dissolved the Courts-Martial involving 'proceedings concerning the deportations',[124] a dissolution that became effective in October 1920 with the demise of Damad Ferid's cabinet. The President of the Courts-Martial and three other members were arrested on 14 November for 'irregularities' involving Nusret's death sentence, and on 10 December 1920 the new President began to release prisoners.[125] On 3 January 1921, the Kemalist Ankara government decided to have its Independence Court supplant the Courts-Martial in the judgment of the crimes committed in Yozgat (Ankara province). On 13 January 1921, the full Courts-Martial were abolished. On 25 April 1922, the last cabinet of the last Grand Vizier was impelled by the Kemalists to declare military tribunals incompetent to try 'nationalists', meaning adherents of Kemalism.[126] On 11 July 1922, it was reported in *Tercüman-ı Hakikat*, a daily newspaper, that the government had abolished the Courts-Martial.

On 31 March 1923, a general amnesty was announced for all those convicted by the Courts-Martial as well as by civilian courts.[127] The Military Appeals Court overturned the 20 July 1920 verdict of the former Governor of Baiburt, Nusret and declared both Nusret (found guilty and executed in the Baiburt trial) and Kemal (found guilty and executed in the Yozgat trial) 'national martyrs'. On 25

[123] Willis, above n 13, 155. [124] Dadrian, above n 8, 52. [125] Akçam, above n 12, 354.
[126] G. Jaeschke, *Türk Inkilâbi Tarihi Kronolojisi 1918-1923* (Chronology of the Turkish Revolution, N.R. Aksu Trans, 1939), cited in Dadrian, *The History*, above n 13, fns 111, 113, 340–1.
[127] Jaeschke, above n 126, 76, 148; cited in Yeghiayan, above n 9, 184.

December 1920, the Ankara regime enacted Law No. 80/271, allocating a pension for the family of Nusret. On 14 October 1922, Mehmed Kemal, executed on 10 April 1919 in the Yozgat trial, was proclaimed a 'National Martyr' by special legislation enacted by the Turkish Grand National Assembly in Ankara.[128] The Grand National Assembly held a ten-minute silence to honour the memory of Nusret, naming a region, a school, and a street in Urfa after him, and a statue of Kemal was erected in the public square of Bogazhyan.[129]

When the Grand Vizier was called to present Turkey's case before the Council of Ten on 17 June 1919, he asked for clemency for Turkey, arguing that 'the great trial of the Unionists at Constantinople has proved the responsibility of the leaders of the Committee [for war crimes committed]'.[130] His appeals, however, were rebuffed.[131] His request a short time later to the Allies to force the Germans to extradite Enver, Talât, and Djemal (Cemal) to Turkey was also denied.[132]

(X) Conclusion

The Special Military Tribunal established by the Ottoman state at the end of World War I, the Courts-Martial, provided a record of the genocide of the Armenians. In its use of extensive documentary materials and interrogation of key participants, it provided evidence of the manner in which the genocide was perpetrated. Following the tradition of the Ottoman state in establishing court-martials, it drew on established law to address the massacres perpetrated and associated crimes and clearly addressed them as a crime of state. In one trial, a witness spoke of 'doing government business', and in others, ministers and officials gave evidence that 'deportation' in reality meant 'annihilation'.

The trials were in many ways a pragmatic political response to the situation in which Turkey found itself in the wake of World War I, particularly the threat of harsh sanctions. They also located the genocide of the Armenians amongst other crimes such as bad governance and misappropriation of property. It was hoped that a response to the massacres would bring some lenience and that this would also solidify the government in a time of political turmoil. As such, the trials can be viewed as a project of nation-building and an attempt to establish the parameters of the post-war Ottoman state. These efforts were impeded by Allied incursions into Turkey, by a civil service that attempted to boycott the trials, and overall by an extremely fragile internal political situation. Despite this, the trials provided a record and, critically, recognition of the genocide orchestrated by the Ottoman state. While it only succeeded in a few actual sentences that were not *in absentia* (which resulted in strong criticism from the Armenian press), it created an official

[128] Höss, above n 11, 219.
[129] Dadrian, above n 8, 52.
[130] Council of Ten Meeting, 17 June 1919, *FRUS: Paris Peace Conference 1919*, 508–12, cited in Willis, above n 13, 156.
[131] Council of Ten Meeting, above n 130.
[132] Council of Ten Meeting, above n 130.

record of the genocide, one that was mirrored by political and media commentary at the time.

The record of these trials, however, was actively buried by the new Turkish state. They have been largely hidden for years, resurrected mainly by a few scholars with some access to the archives. Many documents have been destroyed, and the archive is still largely closed. This has supported Turkey's insistence for years that the genocide did not happen. Yet despite these trials being actively hidden by Turkey, the record of law is something that remains—both to counter the denial and to provide a record of the genocide. It is a hidden story that can be resurrected. Law produces records. It is the legitimacy of law, even in fragile political times, that creates public and authoritative records and acknowledgement.

The Courts-Martial also show the limitations of law—particularly as a record of history—when this history has been submerged under new nationalist priorities, such as those of modern-day Turkey. Despite the clear and official acknowledgement of the genocide provided by the post-war government and as found in the trial verdicts, denialism has prevailed. The story of both the trials and the genocide has largely remained hidden. Yet that the records of these trials exist, albeit fragmented (it is unclear as to how much was destroyed by Turkey), allows for the record to be upheld. This account provided by law provides some level of accountability. While the political can subvert the legal record, the legal record remains.

PART 2

EUROPEAN HISTORIES I: PROSECUTING ATROCITY

5

Justice for No-Land's Men? The United States Military Trials against Spanish Kapos in Mauthausen and Universal Jurisdiction

Rosa Ana Alija-Fernández[*]

(I) Introduction

In 1947, five Spaniards—Joaquín Espinosa, Laureano Nava, Indalecio González, Moisés Fernández and Domingo Félez[1]—were tried before United States military courts in occupied Germany. Their treatment and, in particular, the application of universal jurisdiction to nationals of neutral states and stateless people, represent an important 'untold story' of the post-war trials and provides an unusual precursor to the development of universal jurisdiction in general. Their story illustrates also the effects of the brutalizing industrialized evil implemented by Nazism and the negative effects of industrialized justice carried out by the Allies at the end of World War II. Life for inmates in concentration camps—where being a hero or a villain depended to a great extent on a volatile fate—was too complex for men to understand and so simplification and silence have become useful tools to absorb it. As fighting against impunity after World War II was a laudable task, mistakes in the administration of justice seemed more acceptable. Insignificant as these cases might have been in the wider context of post-war justice, to shed light on them now can help both to track the evolution of universal jurisdiction and remind international criminal lawyers that fighting against impunity after mass atrocities

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[1] Names in the official documents contain several spelling mistakes. For instance, the correct spelling of Lauriano Navas should be Laureano Nava, while Indalecio González's surname was spelled Gonzaless in the documentation, and Domingo Félez was called Felix Domingo during the whole proceedings (although he is correctly named at Joaquín Espinosa's trial, where he acted as a witness). Here the proper spellings will be preferred, although the original spelling will be kept when citing the name of the cases or directly quoting the content of a document.

requires quantity, but also quality considerations: due process must be upheld as the only way to prevent injustice and victimization.

Former soldiers in the Spanish Republican Army fighting against Franco's fascism, Espinosa, Nava, González, Fernández and Félez fled to France after Franco's victory, where they joined the fight against Nazism.[2] Indeed, many veterans from the Republican Army joined the French Army as members of the Foreign Legion (*Légion étrangère*) and the so-called Marching Battalions of Foreign Volunteers (*Bataillons de marche des volontaires étrangers*), created between 1939 and 1940,[3] as well as members of the Companies of Foreign Workers (*Compagnies de travailleurs étrangers*).[4] Those in the Legion and the Battalions (some 15,000 people in total) were combatants, while some 55,000 people in the Companies worked to fortify the French defences along the German and Italian borders.[5] In the period from 10 May to 20 June 1940, during the invasion of France, around 20,000 Spaniards were captured by German troops and taken to concentration camps. Mauthausen was the main destination for Spanish prisoners, to the extent that by 1941 they most probably represented sixty per cent of the camp's population.[6] More than seven thousand veterans of the Spanish civil war were deported there during World War II; around 5,000 of them died due to mistreatment and starvation. Three thousand more were deported to other camps, like Dachau, Buchenwald, Bergen-Belsen and even Auschwitz and Treblinka.

Espinosa, Nava, González, Fernández and Félez were working for the French Army when they were captured by the Germans and taken first to prisoner-of-war camps (*Stalags*)[7] and later to Mauthausen, from where they were transferred to its satellite sub-camps (mainly Gusen—both 1 and 2—,Steyr and Wiener-Neudstadt).[8] After the liberation of the camp by US troops on 5 May 1945, the five Spaniards were accused of having held posts as Kapos in Mauthausen and, as a result, apprehended and taken to Dachau, where they were tried by military courts on the basis of their participation in a joint criminal enterprise. Kapos were inmates

[2] Many Spaniards fought in the European battlefields, both with the Allies and beside the Axis troops. The last ones were integrated into the so-called 'Blue Division' (*División Azul* or *Spanische Blaue Division*), a hybrid military unit, somewhere between a regular unit of the Spanish Army and a voluntary unit (Emilio Sáenz Francés, *Entre La antorcha y la esvástica: Franco en la encrucijada de la Segunda Guerra Mundial* (Madrid: Actas, 2009), 88), that was sent to support the German efforts in the new Russian front.

[3] Luis Reyes, *Españoles en la Segunda Guerra Mundial* (Madrid: Aldaba Ediciones SA, 1990), 11.

[4] Most of those Companies, created in 1939 to solve the issue of the thousands of exiled republicans arriving in France, were sent to the Maginot Line and to the French-Belgian border, some were sent to the Alps and the rest were distributed throughout France.

[5] Eduardo Pons Prades, *El Holocausto de los republicanos españoles: Vida y muerte en los campos de exterminio alemanes (1940–1945)* (Barcelona: Belacqva, 2005), 41.

[6] David Wingeate Pike, *Spaniards in the Holocaust: Mauthausen, the Horror on the Danube* (New York, NY: Routledge, 2000), 12.

[7] However, it seems that neither Spaniards in the Companies nor in the French army were granted prisoner-of-war (POW) status during their staying in Stalags, but instead they were treated as anti-Nazi elements: Reyes, above n 3, 11–13. But see Benito Bermejo and Sandra Checa, *Libro Memorial: Españoles deportados a los campos nazis (1940–1945)* (Madrid: Ministerio de Cultura, 2006), 17–19.

[8] For a list of sub-camps see *Mauthausen Memorial* [website], <http://en.mauthausen-memorial.at/index_open.php> (accessed 24 February 2013).

appointed by the SS to command work details (*Kommandos*). They were usually selected because of their physical condition, but they were also sometimes chosen because of their expertise concerning the tasks the team was meant to carry out. Frequently mistreated by the SS, many chose sadism against fellow inmates as a strategy to survive, while others used their position to protect other inmates from excessive abuse.[9] Victims and tormentors at once, they were highly controversial figures inside the camps whose very existence served to destroy social ties among prisoners.[10]

Several objections can be made to the way proceedings were carried out, particularly in relation to process standards. Although military courts had general jurisdiction over crimes committed in the zone of occupation under the control of the United States, the fact that Spain had been a neutral state during the war generated some hesitation concerning their authority to try the five men. The jurisdictional question was finally answered in the affirmative, based on the principle of universal jurisdiction, among other grounds. In this chapter it is argued that this instance marks the first time universal jurisdiction was invoked to try nationals of a neutral country, or even stateless people—given the very particular circumstances surrounding Spanish Republicans in concentration camps—for war crimes. To that end, section II offers an overview of the legal and jurisdictional framework of the Dachau trials that determined the scope of the indictment and the trials against the five Spaniards. Section III focuses on whether the alleged neutrality of Spain during World War II acted as an obstacle to their prosecution and whether invoking universal jurisdiction was thus needed or—as it seems—whether relying on such a jurisdictional ground was more of a precautionary measure than a real problem of lack of jurisdiction. Section IV argues that this was the first time that such a ground was invoked to try stateless people, as in practice Spanish Republicans were completely neglected by Franco's government, who considered them not to be Spaniards (nor did they receive any protection from any other country).

(II) US Military Courts' Trials over the Joint Criminal Enterprise in the Concentration Camp Mauthausen

Proceedings before US military courts in Dachau were authorized by Joint Chiefs of Staff Directive 1023/10 of 8 July 1945 (JCS 1023/10),[11] which instructed the

[9] Falk Pingel, 'Social life in an unsocial environment. The inmates' struggle for survival', in Jane Caplan and Nikolaus Wachsmann (eds), *Concentration Camps in Nazi Germany: The New Histories* (New York, NY: Routledge, 2010), 59.

[10] On the role and position of the Kapos at concentration camps, see Eugen Kogon, *Sociología de los campos de concentración* (Madrid: Taurus, 1965), 106–8; Wolfgang Sofsky, *The Order of Terror: The Concentration Camp* (Princeton, NJ: Princeton University Press, 1993), 132; Vincenzo and Luigi Pappalettera, *Los S.S. tienen la palabra. Las leyes del campo de Mauthausen reveladas por las Schutz-Staffeln* (Barcelona: Laia, 1969), 31.

[11] Joint Chiefs of Staff, *Directive on the Identification and Apprehension of Persons Suspected of War Crimes or Other Offenses and Trial of Certain Offenders*, 1023/10 (JCS 1023/10). Draft in Telford

commanders in chief of the Allies' occupation forces to identify and apprehend persons suspected of war crimes or other offences in their respective zones.[12] It further stipulated that the courts would have jurisdiction ratione materiae over (a) atrocities and offences against persons or property constituting violations of international law, including the laws, rules and customs of land and naval warfare; (b) initiation of invasions of other countries and of wars of aggression in violation of international laws and treaties; and (c) other atrocities and offences, including atrocities and persecutions on racial, religious or political grounds, committed since 30 January 1933.[13]

Regarding their jurisdiction ratione personae, the directive specified that the term 'criminal' was meant to include all persons, 'without regard to their nationality or capacity in which they acted, who have committed any of the aforementioned crimes', including those who (a) had been accessories to the perpetration of such crimes; (b) had taken a consenting part therein; (c) had been connected with plans or enterprises involving their commission; or (d) had been members of organizations or groups connected with the commission of such crimes.[14]

JCS 1023/10 was the jurisdictional basis for the US trials over crimes perpetrated at concentration camps in Germany and Austria. Among these trials, two categories can be distinguished: (1) the so-called 'parent cases', that is to say the initial trials against the main leaders in the administration of each concentration camp whose personnel were in US custody; and (2) the 'subsequent cases' against any other official or employee involved in the criminal enterprise that each camp was found to be. The trials against the five Spaniards fell into the latter category.

(1) The parent case: *US v Altfuldisch et al*

The parent-case system was intended to facilitate expeditious proceedings: an initial trial concerning one concentration camp was held, and the findings in the case were then used to try other participants in the camp in subsequent trials 'without having to re-establish the evidence'.[15] The US military courts sitting in Dachau held six concentration camp trials.[16] The one concerning the Concentration Camp Mauthausen, *US v Altfuldisch et al*, took place in the spring of 1946 and involved

Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No 10* (Washington DC: Government Printing Office, 1949), 244–5.

[12] The general authority for criminal procedures against war criminals in Europe, though, is to be found in the Moscow Declaration of 1 November 1943. JCS 1023/10 was later used as the basis for Control Council Law No 10: Taylor, above n 11, 244.

[13] *JCS 1023/10*, [2].

[14] Exceptionally, only persons who had held high political, civil or military (including General Staff) positions in Germany or in one of its allies, co-belligerents or satellites, or in the financial, industrial or economic life of any of these countries, were considered to be accountable for invasions and wars of aggression: *JCS 1023/10*, [2].

[15] Tomaz Jardim, *The Mauthausen Trial: American Military Justice in Germany* (Cambridge, MA: Harvard University Press, 2012), 49.

[16] Concentration Camps Dachau, Buchenwald, Flossenbürg, Mauthausen, Mittelbau-Dora/Nordhausen and Mühldorf.

sixty-one defendants accused of having committed war crimes. In this case, besides the findings as to the charges and particulars, the court also entered the following 'special findings':[17]

- Concentration Camp Mauthausen was essentially a criminal enterprise.
- It was impossible for anyone to be employed at or present in the camp without acquiring definite knowledge of the criminal practices.
- Every military or civil employee or official connected with the camp, regardless of his capacity, was guilty of the crime of violating the laws and usages of war.[18]

Given the finding that the mass atrocities which took place at the camp were criminal in nature and that those involved in them acted in pursuance of a common design, military courts trying subsequent proceedings linked to the parent case were directed to presume—subject to rebuttal by appropriate evidence—that those shown by competent evidence to have participated in the mass atrocity knew of the criminal nature of that enterprise.[19]

The Deputy Judge Advocate for War Crimes stated that such special findings were 'no attempt to sentence any individuals as a result of a trial "in absentia" '.[20] Equally, if additional participants were brought to trial for their complicity in the mass atrocity, that would not mean 'they have been previously tried because of these findings'.[21] Instead, they would have an opportunity to show that they were not in Mauthausen. However, the fact that the special findings were used to establish guilt in further proceedings regarding crimes perpetrated in Mauthausen imposed on the defendants the burden of proof—indeed probatio diabolica ('devil's proof')—of their own innocence,[22] as they would have had to show that:

> [T]hey were not in the Mauthausen Concentration Camp, that, if they were there, they did not know of the criminal nature of the operation, or that, if they did participate with knowledge of the criminal nature of the operation, the nature and extent of their participation was negligible and that the criminal operation was not encouraged, maintained, or furthered to any substantial degree by such negligible participation.[23]

[17] A court-martial 'may characterise or explain the finding, (or sentence,) or accompany it with animadversions, recommendations or other remarks': William Winthrop, *Military Law and Precedents* (Washington DC: Government Printing Office, 2nd edn, 1920), 385.

[18] *US v Hans Altfuldisch (Review and Recommendations)* (Deputy Judge Advocate's Office, 7708 War Crimes Group, European Command, APO 178, Case No 000-50-5, March 1946) (*Altfuldisch Review*), 4: 'any official, governmental, military or civil, whether he be a member of the Waffen SS, Allgemeine SS, or any guard, or civil employee, in any way in control of or stationed at or engaged in the operation of the Concentration Camp Mauthausen, or any or all of its by-camps in any manner whatsoever, is guilty of crimes against the recognized laws, customs, and practices of civilized nations and the letter and spirit of the laws and usages of war, and by reason thereof is to be punished'.

[19] Letter of the Theatre Commander, *Mass Atrocity Subsequent Proceedings*, 14 October 1946, file AG 000.5 WCR-AGO, subject: 'Trial of War Crimes Cases', US Forces, European Theatre, [12].

[20] *Altfuldisch Review*, above n 18, 17.

[21] *Altfuldisch Review*, above n 18, 17–18.

[22] Jardim, above n 15, 49.

[23] *Altfuldisch Review*, above n 18, 18.

Such reasoning by the Deputy Judge Advocate implied an extremely rigid application of the common design charge, for it failed to take into consideration how a person came to be present in the camp, and did not discriminate between those who were military or civilian officials in the Nazi system and those who were inmates in the camp. This led in 1951 to a review by War Crimes Board of Review No. 1 in the case against Karl Horcicka and others (Case No. 000-50-5-32), where it was held that an accused who was neither 'a member of the Waffen SS, Allegemeine SS, a guard, or a civil employee' nor 'a governmental, military or civil official of the camp' was not within the class of persons presumed to be guilty by their mere presence there.[24]

(2) The trials against the 'Spanish Kapos'

The trials against the so-called 'Spanish Kapos' were among the subsequent cases; they targeted officials, guards and civil employees, who might have participated in the day-to-day operations of the Concentration Camp Mauthausen or any of its sub-camps. According to the special findings in the parent case, their culpability for crimes against the laws and usages of the law was understood to be based on their knowledge of the criminal acts that took place in the camp.

The presumption of having participated in a joint criminal enterprise is evident in the charge sheet, which is remarkably vague by today's standards. All five of the defendants were accused of violations of the laws and usages of war. In the case against Espinosa, three particular incidents formed the basis of the charges:[25]

- 'A killing of two or more non-German Nationals, inmates of the Gusen I Concentration Camp, the exact names and numbers of such persons being unknown' (the qualification of 'killing' was later substituted for 'mistreating' by the court);[26]
- 'Assaults upon approximately ten non-German Nationals, inmates of the Gusen I Concentration Camp, the exact names and numbers of such persons being unknown' (again, modifications to this charge were made by the court, which decided to disregard the specific number of ten victims);[27]
- 'Assaults upon two or more non-German Nationals, inmates of the Gusen 2 Concentration Camp, the exact names and numbers of such persons being unknown'.

In spite of all the 'unknown' information, these charges referred, to some extent, to specific criminal behaviours and incidents. That represents a very high level of

[24] *US v Karl Horcicka et al (War Crimes Board of Review No. 1)* (Office of the Judge Advocate, Headquarters, European Command, Case No 0000-50-5-32, 30 April 1948) (*Horcicka Review*), 2.
[25] *US v Joaquín Espinosa (Review and Recommendations)* (Deputy Judge Advocate's Office, 7708 War Crimes Group, European Command, APO 407, Case No 000-Mauthausen-19, 28 January 1948), (*Espinosa Review*), 1.
[26] *US v Joaquín Espinosa (Trial)* (Military Government Court, Case No 000-Mauthausen-19, 9–12 May 1947) 7/8 (*Espinosa Trial*).
[27] *Espinosa Trial*, above n 26, 8/8.

precision compared to the charges in the case against Laureano Nava and others, where the defendants were charged with having wrongfully encouraged, aided, abetted, and participated in the subjection of non-German nationals 'to killings, beatings, tortures, starvation, abuses, and indignities, the exact names and numbers of such persons being unknown, but aggregating thousands', acting in pursuance of a common design to do so.[28] The only particulars in the indictment were the places where the charged acts had taken place ('at or in the vicinity of the Mauthausen Concentration Camp, at Castle Hartheim, and at or in the vicinity of the Mauthausen Sub-camps'), the time frame ('at various and sundry times between January 1, 1942, and May 5, 1945') and the victims' potential nationality, origin or status.[29] Beyond that, no particulars were provided.

Proceedings took place in Dachau. The trial against Joaquín Espinosa was held from 9–12 May 1947, while the trial against Laureano Navas, Indalecio González, Moisés Fernández and Domingo Félez was held from 14–21 July 1947. Being subsequent trials concerning the criminal operation carried out in Mauthausen, the law to be applied in the two cases was to be subject to the special findings in the parent case. The defence therefore had the burden of proving that these men were not aware of the criminal nature of the operation carried out in Mauthausen (rather improbable given that they were themselves inmates in the camp, although some statements in the records indicate that lack of knowledge might have been considered a potential line of defence[30]) or that the nature and extent of their participation was negligible and in no way encouraged, maintained, or furthered the criminal operation. Neither the fact that they themselves were victims of the Nazi system nor the potential impact of the harsh living conditions on their behaviour were considered as a mitigating, if not exonerating, factor. Indeed, in his closing argument in *US v Lauriano Navas*, the Prosecutor took for granted that the defendants had been chosen as Kapos due to their criminal nature,[31] and superior orders was not a valid defence here 'for in most of the cases the capo [sic] was in complete charge of the detail as far as punishment was concerned'.[32] Instead, the defence counsel, while assuming that Kapos were criminal prisoners, claimed that there was no evidence that the accused 'were criminals before they were put in a concentration camp by the German authorities'.[33] Therefore, the whole discussion was focused

[28] *US v Lauriano Navas (Review and Recommendations)* (Deputy Judge Advocate's Office, 7708 War Crimes Group, European Command, APO 407, Case No 000-50-5-25, 14 January 1948) (*Navas Review*), 1.

[29] 'Poles, Frenchmen, Greeks, Jugoslavs, Citizens of the Soviet Union, Norwegians, Danes, Belgians, Citizens of the Netherlands, Citizens of the Grand Duchy of Luxembourg, Turks, British Subjects, stateless persons, Czechs, Chinese, Citizens of the United States of America, and other non-German nationals who were then and there in the custody of the then German Reich, and members of the armed forces of nations then at war with the then German Reich who were then and there surrendered and unarmed prisoners of war in the custody of the then German Reich': *Navas Review*, n 28 above.

[30] See *US v Lauriano Navas (Trial)* (Military Government Court, Case No 000-50-5-25, 14–21 July 1947) 13/3 (*Navas Trial*) (testimony by Indalecio González stating that he had never heard from anyone in the camp that someone beat prisoners to death).

[31] *Navas Trial*, above n 30, 16/2 (Prosecutor's closing argument).

[32] *Navas Trial*, above n 30, 16/4.

[33] *Navas Trial*, above n 30, 16/4 (Defense Counsel's closing argument).

on the determination whether they would fit in the definition of Kapos as criminal prisoners.

Furthermore, the cases do not seem to have been especially scrupulous regarding basic due process standards. Particularly controversial was the issue of language, as none of the defendants had a good command of either English or German, so translation into Spanish was needed. Among those appointed as translators was a court reporter who claimed that her Spanish was not good enough to perform as a translator in a trial where the death penalty might be applied.[34] During the trials, it became evident that written declarations were not always made or read in a language that the witnesses and/or the defendants could understand.[35] There were also complaints regarding the 'professionalism' of some witnesses,[36] as well as about the fact that, after witnesses' depositions, visitors attending the trials were leaking to other witnesses information about what was going on in the room.[37] Moisés Fernández even claimed he had been mistreated during the interrogatories after his refusal to plead guilty to two killings.[38]

Such anomalies could probably have been avoided if Spain had become involved in these trials. However, there is no evidence that the Spanish government either showed any interest in the course of the proceedings or that the United States informed the Spanish authorities about them. That lack of communication is in no way surprising, given that Spain was clearly much more sympathetic to the Axis States than to the Allies. In any case, the aforementioned irregularities did not stop the courts finding four of the men (Espinosa, Nava, Fernández and González) guilty of the charge of violation of the laws and usages of the law, acting in pursuance of the common design that had already been established in the parent case.[39]

All four admitted during the trial to having performed duties either as Oberkapo, Kapo or assistant Kapo.[40] Joaquín Espinosa was specifically accused of several incidents –including beatings allegedly resulting in death while acting as an assistant Kapo (1942–1943) and a Kapo (1944–1945) in the 'potatoes detail' in Gusen. But evidence was not sufficient to prove the most serious charges, so, in order to adjust the charges to the proven facts, the court modified the wording of the indictment by replacing the original reference to 'killing' with 'mistreating', although

[34] The *Washington Post* published a letter to the editor signed with her name, criticizing 'the callous unconcern whether [the Spaniards] understood the proceedings' and her assignment as a translator in the *Lauriano Navas* case: Eve Fridell Hawkins, 'Ilse Koch', *The Washington Post*, 27 September 1948, 12. However, inquiries on this issue concluded that she had never expressed any protest at the time of her appointment or during the trial: letter from Colonel J.L. Harbaugh, Judge Advocate, to Chief, War Crimes Branch, Civil Affairs Division, Department of the Army Special Staff, *Request for Information (US v Lauriano Navas et al*, Case No. 000-50-5-25), October 1948, 3.

[35] See *Navas Trial,* above n 30, 4/15 (testimony by Pedro Gómez, witness for the Prosecution) and 11/15–11/16 (testimony by Moisés Fernández, defendant), *Espinosa Trial,* above n 26, 6/14–6/15.

[36] *Navas Trial,* above n 30, 14/6.

[37] *Navas Trial*, above, n 30, 4/1.

[38] *Navas Trial*, above, n 30, 11/16.

[39] According to the Orders on Review, the specific offence committed was 'participation in Mauthausen Concentration Camp mass atrocity'.

[40] *Navas Trial*, above, n 30, 11/11 (Fernández), 13/11 (González), 14/14 (Navas). As for Joaquín Espinosa, see *Espinosa Trial,* above n 26, 6/6.

according to the prosecutor such a crime did not exist.[41] Espinosa received a three-year sentence commencing on 5 May 1945, at Landsberg war crimes prison.

Indalecio González, aka 'Astoria' or 'Asturias', was accused of having been an Oberkapo who often beat prisoners, sometimes to death. He was sentenced to death, and, although many petitions of clemency were received from the Spanish Republican government in exile, he was hanged on 2 February 1949.

Laureano Nava was accused of having regularly beaten inmates while performing duties as an assistant Kapo. Two prisoners were alleged to have died as a result of the hard beatings, in spite of the fact that Nava was crippled in his right hand due to a wound he had received in the Spanish Civil War. Sentenced to life imprisonment, he requested a revision of the sentence. His lawyer proved that life imprisonment had been based on the testimony of just two witnesses.[42] In 1951 his sentence was reduced to time served and he was released on 18 January 1952.

Moisés Fernández, aka 'César' or 'Caesar', was accused of having been an assistant Kapo and having mistreated prisoners, allegedly causing the death of one of them. He was sentenced to twenty years' imprisonment. Without the advice of a lawyer, he put all his efforts into getting his case reviewed. In 1951 the sentence was reduced to fifteen years on the basis that there was not enough evidence to support the sentence. The Judge Advocate had supported a reduction after finding that Fernández had committed, at best, a minor assault, which made the sentence excessive, considering the case as a whole and comparing it to similar cases.[43] Attention was also paid to his delicate health (he suffered from tuberculosis). Fernández died on 24 June 1952, before being released.

Domingo Félez, who had worked as a camp barber, was accused of marking the inmates with letters that would indicate whether they were to be sent to the crematory or to the gas chamber and of having struck an inmate once. He was initially sentenced by the court to two years' imprisonment (commencing 13 May 1945), but immediately released (on 28 July 1947), as he had already been in prison for longer than the sentence period.[44] Some months later, in January 1948, the Deputy Judge reviewing the case considered the evidence insufficient to show that he had encouraged the common design or participated therein. Upon his recommendation, the sentence was disapproved.[45]

[41] *Espinosa Trial,* above n 26, 8/8.

[42] *US v Lauriano Navas (Review of the War Crimes Branch—Accused: Lauriano Navas)* (Office of the Judge Advocate, Headquarters, European Command, Case No 0000-50-5-25, 18 April 1951), [4.b.2].

[43] In the report, the reviewing officer also recalled the aforementioned doctrine established by the War Crimes Board of Review at *US v Karl Horcicka*—stating that the mere presence in the camp of the alleged perpetrator, irrespective of his position there, was not enough to presume his guilt: *Horcicka Review*, above n 24, 2—(*US v Lauriano Navas (Review of the War Crimes Branch—Accused: Fernández, Moisés)* (Judge Advocate Division, Headquarters, European Command, AFO 403, US Army, Case No 0000-50-5-25, 18 April 1951), [3.a.2]). Although no further indication as to whether Fernández fell into one of the categories to which the presumption of guilt should apply, it might have influenced the recommendation to reduce the sentence.

[44] Memorandum from AG 383 JAG to Director, War Criminal Prison, Release of prisoner in the Case of the *United States v Lauriano Navas, et al* (Case No. 000-50-5-25), 15 March 1948.

[45] *Navas Review*, above n 28, 10.

(III) The Trials against the 'Spanish Kapos': A Challenge to US Military Courts' Jurisdiction?

The trials against Joaquín Espinosa, on the one hand, and Laureano Nava, Indalecio González, Moisés Fernández as well as Domingo Félez, on the other hand, hold a special interest because, not being nationals of an enemy country but of a neutral state, they challenged the jurisdiction of the military courts.

However, whether Spain was a neutral country during World War II is a matter of opinion. Indeed, Franco's Nationalist regime formally adopted a position of neutrality at the beginning of World War II, formalized in two agreements signed as early as December 1936 with Italy and in March 1939 with Germany. But when a German victory became likely, belligerence was considered by the Spanish government, as a means to satisfy certain territorial aspirations.[46] In 1940, after the defeats of the Netherlands and Belgium, Spain changed its neutral status into one of 'non-belligerence', a qualified form of neutrality that in practice was a status prior to belligerence.[47] This concept was invented by Mussolini in 1939 to express Italy's support (short of participation in the war) for Germany.[48] Only the German refusal to meet the conditions imposed by Franco's government in order for Spain to fight by Germany's side prevented Spain from taking the further step towards belligerence. Later on, when the United States entered the war and it became obvious that this could have a negative effect on the Spanish interests,[49] a clear position from Spain was needed: either join the Axis or adopt genuine neutrality.[50] To that end, on 1 October 1943, Franco announced in a speech that Spain had returned to 'watchful neutrality'.[51]

[46] Franco's government hoped that in exchange Germany would help Spain to expel the British from Gibraltar and to expand in Northern Africa. See Rafael García Pérez, *Deuda, Comercio y Nuevo Orden: España y el Tercer Reich durante la Segunda Guerra Mundial (1939–1945)* (Madrid: Ed. de la Universidad Complutense de Madrid, 1993), 291–3; Juan Carlos Jiménez Redondo, 'La política española en los años de la II Guerra Mundial', *Bulletin d'Histoire Contemporaine de l'Espagne*, *22* (1995), 30. Plans were even made to invade Portugal, see Gustau Nerín and Alfred Bosch, *El imperio que nunca existió. La aventura colonial discutida en Hendaya* (Barcelona: Plaza & Janés, 2001), 41, 49; Manuel Ros Agudo, *La gran tentación: Franco, el imperio colonial y los planes de intervención en la Segunda Guerra Mundial* (Barcelona: Styria, 2008), 269–79.

[47] Manuel Espadas Burgos, *Franquismo y política exterior* (Madrid: Rialp, 1987), 92. The practice concerning non-belligerence during the Second World War is discussed at 92–5.

[48] Edward R. Cumming, 'The evolution of the notion of neutrality in modern armed conflicts', *Military Law and Law of War Review*, *17* (1978), 48.

[49] The participation of the United States meant increasing economical restrictions, a higher external pressure over Franco's government and the possibility of the Allies attacking the Atlantic islands without Spain having means of defence: Jiménez Redondo, above n 46, 32–3.

[50] Jiménez Redondo, above n 46, 32.

[51] Ángeles Egido León, 'Franco y la Segunda Guerra Mundial. Una neutralidad comprometida', *Ayer*, *57* (2005), 122.

(1) Overcoming Spanish 'neutrality' through universal jurisdiction

Debatable as it may be, Spanish 'neutrality' during World War II seems to have caused some uneasiness in the Deputy Judge Advocate Office in charge of reviewing the sentences and recommending them for approval. Even though the question had not been raised by the defence in the trials, the review officer considered that the jurisdictional problem merited discussion. The following argument was made:

> War criminals, brigands, and pirates are the common enemies of all mankind and all nations have an equal interest in their apprehension and punishment for their violations of international law. Concerning this question . . . every independent state has the judicial power to punish 'piracy and other offenses against the common law of nations, by whomsoever and wheresoever committed'.[52]

According to this reasoning, these cases were to be seen as typical examples of universal jurisdiction exercised by a state in absence of any direct link with a crime perpetrated neither in the territory of the judging authority nor by or against nationals of that state.[53] Given that war crimes were delicta juris gentium, whose punishment was an issue of general interest to any country, all states had the jurisdiction to try and punish them.

There are some precedents for this in the aftermath of World War II.[54] The earliest examples, though, concern German defendants or nationals of Axis States, as in the *Hadamar* trial (8–15 October 1945), the *Dachau* parent case (15 November–13 December 1945), the *Almelo* trial (24–26 November 1945), and the *Zyklon B* case (1–8 March 1946).

The *Hadamar* trial took place before a United States Military Commission sitting at Wiesbaden (Germany). The defendants, German nationals, were accused of having taken part in the deliberate killing, by injection of poisonous drugs, of hundreds of Polish and Soviet nationals in a sanatorium in Hadamar, Germany. Despite the fact that the crimes had been perpetrated by non-United States nationals, outside United States territory, and against non-United States nationals, the Military Commission decided to assume jurisdiction in the case. One of the reasons adduced to take such decision was:

> [T]he general doctrine recently expounded and called 'universality of jurisdiction over war crimes', . . . according to which every independent State has, under International Law, jurisdiction to punish not only pirates but also war criminals in its custody, regardless of the nationality of the victim or of the place where the offence was committed, particularly where, for some reason, the criminal would otherwise go unpunished.[55]

[52] *Navas Review,* above n 28, 9. See also *Espinosa Review,* above n 25, 6.

[53] Marc Henzelin, *Le principe de l'universalité en droit pénal international. Droit et obligation pour les états de poursuivre et juger selon le principe de l'universalité* (Basel/Geneva/Brussels: Helbing & Lichtenhahn/Faculté de Droit de Genève/Bruylant, 2000), 29.

[54] Henzelin, above n 53, 407.

[55] *US v Alfons Klein (Trial)* 1945, 1 War Crimes Law Reports 46, 53 (US Military Commission appointed by the Commanding General Western Military District, USFET) (*Hadamar Trial*).

This main reasoning was further supported by two other arguments: the United States' direct interest in punishing crimes against nationals of its allies, and the assumption of its local sovereignty in the United States zone of occupation (therefore deriving its jurisdiction both from the principle of territoriality and the principle of active personality).

The principle of universal jurisdiction was also mentioned in the Dachau camp trial to justify the jurisdiction of the United States military court over crimes against non-members of its forces that had been committed before the United States took control over the territory where they had been perpetrated.[56] In this case, two of the defendants were non-German (Johann Schoepp, a Romanian, and Dr Fridolin Karl Puhr, an Austrian),[57] but that fact was not taken into consideration when invoking the principle.

As far as the *Almelo* trial and the *Zyklon B* case are concerned, both took place before British courts, sitting in Almelo, The Netherlands, and Hamburg, Germany, respectively. In the *Almelo* trial, four German nationals were tried for the extra-judicial killing of a British prisoner of war and of a Dutch civilian, as well as espionage and war treason. The jurisdiction of the British court was established once more on the basis of universal jurisdiction over war crimes.[58] The universal jurisdiction argument was again supplemented by the principle of the direct interest of the judging state, British sovereignty over its zone of occupation, and the active personality principle. The *Zyklon B* case involved three German nationals accused of supplying poison gas used to kill Allied nationals (although seemingly non-British) interned in concentration camps, knowing that the gas was to be so used. Unlike in the *Hadamar* and the *Almelo* trials, the main argument put forward to establish British jurisdiction was British local sovereignty over its zone of occupation (active personality and territoriality). Universal jurisdiction was in this case a supplementary ground for jurisdiction, together with the state's direct interest in punishing the crimes perpetrated against Allied nationals.[59]

To be sure, there had been trials of neutral countries' nationals, but no arguments were made regarding universal jurisdiction. For instance, in the first *Ravensbrück* trial, a Swiss citizen, Carmen Mory, was sentenced to death by a British military court sitting in Hamburg.[60] However, the court did not invoke universal jurisdiction. The most probable reason for this seems to have been that no complaints were expected to be lodged by the Swiss government which was perfectly aware of the steps taken in the proceedings against Mory. A report by Captain John Sigrid da Cunha describing a meeting with a representative of the Swiss Ministry of Justice

[56] *US v Martin Gottfried Weiss (Review of Proceeding of General Military Court)* (Office of Judge Advocate, Third US Army and Eastern Military District, Case No. 000-50-2, 15 November–13 December 1945) (*Weiss Review*), 140.

[57] (*Weiss Review*), above n 56, 2.

[58] *Prosecutor v Otto Sandrock (Trial)* 1945, 1 War Crimes Law Reports 35, 42 (British Military Court for the Trial of War Criminals, Court House, Almelo, Holland).

[59] *Prosecutor v Bruno Tesch (Trial)* 1946, 1 War Crimes Law Reports 93, 103 (British Military Court, Hamburg).

[60] *Prosecutor v Johan Schwarzhüber (Trial)* (Military Court held at No. 1 War Crimes Court, Curiohaus, Rothenbaumhaussee, Hamburg, 5 December 1946–3 February 1947).

supports this. According to Captain da Cunha, the Swiss government did not object to Mory's trial and sentence. Given the serious nature of the crimes alleged, it was not 'desired in any way to use diplomatic influence or action with a view to actively intervening in the legal process'.[61]

At least two more trials against Spaniards took place in France in 1947, just weeks before the trial against Espinosa started. In neither trial was the problem of jurisdiction raised. The first one was the trial of José Pallejà Caralt by a military court in Toulouse. Pallejà Caralt was found guilty of having committed espionage. According to the court, inasmuch as he had worked as a Kapo, he had been feeding intelligence to Germany with a view to favouring its enterprises against France ('*en vue de favoriser les entreprises de cette puissance contre la France*'), in particular by imposing over the inmates an inhumane work that benefited the enemy and caused the death of many Frenchmen. He was sentenced to death on 11 March 1947.[62] The second trial, on 25 April 1947, saw Gregorio Lendínez Montes face a military court in Paris on charges of murder and ill-treatment. Lendínez was acquitted of all the charges.[63] The records of Pallejà's appeal proceedings before the Cour de Cassation show that the issue of his Spanish nationality was not controversial.[64] Actually, the court held that crimes against the security of the state could be perpetrated both by members of the French Army and by foreigners serving in the army, according to a decree-law of 29 July 1939.[65]

In view of these precedents, it can be concluded that the 'Spanish Kapos' trials seem to have combined for the first time neutrality and universal jurisdiction regarding war crimes.

(2) A real need to invoke universal jurisdiction?

The interest that these two trials may have in tracking the history of universal jurisdiction increases when one considers that there was no call for universal jurisdiction to legitimate the authority of US military courts to try the five Spaniards.

To begin with, JCS 1023/10 provided that anybody who had committed any of the listed crimes was considered to be a criminal, *regardless of his or her nationality*. It imposed no Axis nationality requirement for alleged war criminals. This did not

[61] Record of negotiations with regard to the trial of Carmen Mory, Capt. J.W. da Cunha, 4 September 1946 (UK National Archives, file WO 309/684). The representative of the Swiss Ministry of Justice would have further expressed gratitude on the part of the Political Department of the Foreign Office for the correctness of the British attitude in contacting and informing about the details and facts of the forthcoming trial of a Swiss citizen, 'thus avoiding in advance the possibility of diplomatic repercussions'.

[62] *Prosecutor v José Pallejà Caralt (Trial)* (Tribunal Militaire Permanent de la 5ème Région, Toulouse, 25 April 1947).

[63] *Prosecutor v Gregorio Lendínez Montes (Trial)* (2ème Tribunal Militaire Permanent de Paris, 25 April 1947).

[64] *Prosecutor v José Pallejà Caralt (Appeal)* (Cour de Cassation de Paris, 23 July 1947), 1.

[65] *Décret-loi portant codification des dispositions relatives aux crimes et délits contre la sûreté extérieure de l'État*, 29 July 1939.

go unnoticed by the Deputy Judge Advocate, who after invoking universal jurisdiction in his review of the sentence, added that:

> Military Government Courts have jurisdiction over the nationals of any country who are in the United States Zone of Occupation, except as to certain classes of American and other nationals, e.g., military personnel, which are not pertinent to the jurisdictional questions here involved. Concerning jurisdiction over war crimes, no limitation is imposed.[66]

Theoretically, there also existed a number of additional grounds that could have been used to justify the jurisdiction of US courts in these cases. For instance, jurisdiction could have been based on 'the right of a belligerent, on the total breakdown of the enemy owing to debellatio, to take over the entire powers of the latter, including the power to make laws and to conduct trials'.[67] Such a power was assumed by the four Allied powers occupying Germany in the 'Declaration regarding the defeat of Germany and the assumption of supreme authority with respect to Germany by the Governments of the United States of America, the Union of Soviet Socialist Republics, the United Kingdom and the Provisional Government of the French Republic', made in Berlin on 5 June 1945. As indicated above, the local sovereignty of the Allied powers over each of their respective zones of occupation was one of the reasons given to support British and US jurisdiction to try war criminals in the *Hadamar* and *Almelo* trials, as well as in the *Zyklon B* case. Such special sovereignty would have allowed them to prosecute crimes perpetrated in their zone of occupation according to the principle of territoriality. A further reason cited in the aforementioned cases which could have applied in the 'Spanish Kapos' cases was the theory of the direct interest. This theory was adduced in the *Hadamar* trial to justify the jurisdiction of a US military commission over crimes against non-US nationals which were not committed in the US territory nor by US nationals. As already mentioned,[68] the military commission answered in the affirmative not only on the basis of universal jurisdiction over war crimes and the assumption of supreme authority in Germany by the four Allied powers after debellatio, but also the direct interest that the United States (and *mutatis mutandi* every Allied state) had in punishing the perpetrators of crimes committed against nationals of allies 'engaged in a common struggle against a common enemy'.[69]

Finally, a slightly more convoluted basis for jurisdiction was the nationality of the victims in Mauthausen. As the charges in *Altfuldisch* and *Lauriano Navas* indicate, there were US citizens among the inmates in the camp. While this became the core argument in favour of the military court's jurisdiction in the parent case,[70] in the 'Spanish Kapos' cases direct victims of the specific crimes committed were not US nationals. However, in the same manner as guilt was established as a consequence of the participation in the joint criminal enterprise, the factual elements

[66] *Navas Review*, above n 28, 9.

[67] United Nations War Crimes Commission, *Law Report of Trials of War Criminals* (His Majesty's Stationery Office, 1949) vol 15, 27. See also Henzelin, above n 53, 405.

[68] See section II.A. of this chapter.

[69] *Hadamar Trial,* above n 55, 53.

[70] *Altfuldisch Review*, above n 18, 12.

in that wider context could also have been used to justify the jurisdiction of US military courts in the subsequent trials.

Given the variety of grounds of United States jurisdiction, what makes the references to universal jurisdiction in the 'Spanish Kapos' cases especially valuable is that they provide precedents to support the existence of an international practice with respect to this principle and its applicability to nationals of neutral states.

(IV) A Precedent of Universal Jurisdiction Regarding Stateless Persons?

The particular circumstances surrounding the Spanish Republicans in Mauthausen further suggest that they were part of the very first cases where universal jurisdiction was invoked to try stateless persons. The Deputy Judge Advocate decided to justify the authority of the court through universal jurisdiction because the defendants were nationals of a neutral country. What he did not take into consideration, though, was that Spaniards in concentration camps lacked protection from the Spanish government, indeed from any other state, which in turn would mean that the five defendants were de facto stateless persons.[71]

(1) Spaniards who were not Spaniards

The legal status of the Spanish republicans who left Spain after the Civil War was far from clear and confusion spread to the concentration camps where they were interned. It is well-known that Nazis used triangles of different colours to classify inmates. In most of the concentration camps (such as Dachau, Buchenwald-Dora, Sachsenhausen, Bergen-Belsen or Ravensbrück),[72] the *Rotspanier* ('Red Spaniards', as they were called) wore the red triangle that marked them as political prisoners. However, those in Mauthausen were marked with the blue triangle with the letter S inside. Although blue was supposed to be given to 'emigrants' and usually identified foreign forced labourers, its attribution to Spaniards in Mauthausen has been interpreted in different ways.[73]

The most widespread theory is that the blue triangle was given to the exiled Republicans because of Franco's refusal to consider them Spanish citizens. The story goes that, during a conversation between Joachim von Ribbentropp, Reich Minister of Foreign Affairs, and Ramón Serrano Súñer, Spanish Minister of the Interior, in September 1940, Ribbentropp asked Serrano Súñer what Germany was to do with all the Republicans who had been taken prisoners. Serrano Súñer was said to have answered that those people were reds, not Spaniards,[74] thus clearing the way for the

[71] Paul Weis, 'The Convention Relating to the Status of Stateless Persons', *International and Comparative Law Quarterly, 10* (1961), 260.

[72] Montserrat Roig, *Els catalans als camps nazis* (Barcelona: Edicions 62, 5a ed, 1987), 130.

[73] The Spanish Republicans and some stateless Russians were the only ones to wear the blue triangle in Mauthausen: Wingeate Pike, above n 6, 15.

[74] Roig, above n 72, 15.

Nazis to do anything they pleased with them.[75] Unfortunately, there are no written records of such a conversation.[76] Furthermore, the dates do not match, for the first convoy carrying Spaniards arrived at Mauthausen in August 1940.[77]

Still, indications exist that Franco's government was aware of the fact that there were Spaniards in German concentration camps and nothing was done to assist them. From August to October 1940, the German Embassy in Madrid sent several notes verbales to the Spanish Minister of Foreign Affairs, asking whether the Spanish Government intended to take charge of a thousand Red Spaniards under arrest in France. The Spanish Government did not respond to this request.[78] Also, the Spanish Home Office did request information on the situation of Indalecio González after he had been sentenced to the death penalty, but there is no indication of further action taken.[79] Instead, the Republican government in exile sent many petitions for clemency on Gonzalez's behalf, but they were not taken into consideration by US officers both because they 'contained no new evidence or other matters which had any bearing on the case' and because they could not locate the senders (supposedly in Paris).[80]

Were the Spaniards stateless? The charges in *Altfuldisch*[81] and in *Lauriano Navas*[82] include a list of national groups that had been subjected to alleged atrocities.[83] Among them, reference was made to 'stateless persons', but surprisingly enough not to Spaniards, in spite of the fact that they actually became a relevant group in Mauthausen.[84] The charges also refer to 'other non-German nationals', but that seems to be a residual clause, inappropriate for such a large group of inmates as the Red Spaniards were. To include them under the heading of stateless persons would

[75] The preliminary report to United Nations on the issue of refugees assumed this version (Jacques Vernant, *Les réfugiés dans l'après-guerre: Rapport préliminaire d'un groupe d'étude sur le problème des réfugiés* (Geneva: ONU, 1951), 166), although stating that it was the Spanish Minister of Foreign Affairs who intervened (Serrano Súñer held that position from October 1940).

[76] Roig, above n 72, 16–17. In an interview Roig asked Serrano Súñer whether he had talked about this issue with Ribbentropp. Serrano's answer was that he had dealt with the subject in passing for somebody had commented on it on the outward journey, and the Nazis had told him that they were not Spaniards but people who had fought against them in France: at 17. See David Wingeate Pike, *Españoles en el Holocausto: Vida y muerte de los republicanos en Mauthausen* (Barcelona: Mondadori, 2003), 42, quoting a letter by a Nazi official explaining that the Spanish government refused to repatriate the Red Spaniards already in 1940 (such reference is not in the original English version of this work, above n 6).

[77] Wingeate Pike, above n 6, 10. Wingeate Pike suggests that the decision to impose the blue triangle on the Spaniards in Mauthausen was taken on the basis that Spain was not at war with Germany, Spanish prisoners did not have a passport and their status was stateless, as well as to thwart their fight against the Nazis (at 11). Instead, Bernadac describes the decision both as a joke and a big strategic mistake by the administration of the camp (Christian Bernadac, *Les 186 marches* (Geneva: Famot, 1976), 71–2).

[78] Daniel Díaz Esculies, *Entre filferrades: Un aspecte de l'emigració republicana dels Països Catalans (1939–1945)* (Barcelona: Edicions de la Magrana, 1993), 193–6. A facsimile of the notes is available at Rosa Toran, *Vida i mort dels republicans als camps nazis* (Barcelona: Proa, 2002), 299–303.

[79] Letter from Wade M. Fleischer, Chief, International Affaire Branch, to Judge Advocate, 22 August 1947.

[80] Memorandum for Colonel Harbaugh, Inquiry from Secretary General, OMGUS, Concerning the Case of Indalecio Gonzalez, 1 November 1948, [3].

[81] *Altfuldisch Review*, above n 18, 1. [82] *Navas Review*, above n 28, 1. [83] See above n 29.

[84] See Wingeate Pike, above n 6, 12.

therefore seem quite reasonable. On the other hand, the nationalities expressly listed in the *Altfuldisch* and *Lauriano Navas* charge sheets referred only to Allied states, which may have been a way to emphasize the interest of the United States in trying crimes committed against nationals of Allied states. There would have been no reason for Spain, considered to be a neutral country, to be on that list. Unfortunately, absent an explanation for the selection of nationalities included in the charges, no definitive conclusions can be drawn on the issue as to whether the United States might at some point have considered Spaniards as stateless persons.

(2) Protecting Spanish refugees . . . inside the borders

As well as being abandoned by the Spanish government, the Republicans did not receive much protection from other foreign states. France granted the Spanish Republicans refugee status by a decree of 15 March 1945. This decree extended the application of the Convention of 28 October 1933[85] to the Spanish refugees. According to Article 2 of the decree, persons holding or having held Spanish citizenship, not holding another citizenship, and who enjoyed neither de jure nor de facto the protection of the Spanish government, would be considered Spanish refugees.[86] As a result, they were granted a special status, which included the right to an identity and travel certificate, similar to the Nansen passport,[87] and the right of residence in France, which implied the right to not be expelled from the French territory (except on national security or public order grounds) and of non-refoulement to Spain.[88] Also, they would have a specific legal status regarding their personal statute, rights resulting from marriage, and access to court in equal conditions as French nationals. However, the recognition of such rights did not mean that the Spanish refugees could enjoy diplomatic protection from the French authorities.

Disregarded by the Spanish government and enjoying a rather limited refugee status inside France that in no way included protection beyond the French borders, the five Spanish defendants in Dachau lacked any kind of protection from their own country or a third one, what made them de facto stateless persons. If this circumstance is to be taken into consideration, these two cases would then be the first, and presumably the only cases, where universal jurisdiction was invoked to try stateless persons for war crimes. Although—as already pointed out—such an invocation was unnecessary because the court had jurisdiction regardless of the nationality of the defendant.

[85] *Convention Relating to the International Status of Refugees*, signed 28 October 1933, 159 LNTS 199.

[86] Quoted in Comment, 'In re Galvez', *Revue Critique de Droit International Privé*, 36 (1947), 301.

[87] They were not provided with the Nansen passport for they were not considered to have lost the Spanish nationality (*Estatuto jurídico de los refugiados españoles* (Paris: Imprenta Española, 1945), 5–6).

[88] *Estatuto jurídico de los refugiados españoles*, above n 87, 18.

(V) Conclusions

In the years following World War II, subsequent cases of low-profile alleged war criminals, like the 'Spanish Kapos' trials, could easily go unnoticed, the focus being put on major war criminals' accountability. Even at the domestic level these cases were hidden. Propaganda by Franco's government to discredit its enemies in the Civil War or a complaint by the Republican government in exile to denounce the low due process standards might have been expected. Nevertheless, silence concerning these trials suggests that they made both sides uncomfortable, because they demonstrated that Spaniards had been interned at concentration camps with Franco's government abandoning them to their fate, while at the same time casting doubt on the Republican fight for democracy and freedoms. Distance and time allow analysing these cases beyond the domestic limits imposed by the confrontation in the Spanish Civil War. Instead, when looking at them from an international legal approach, it becomes evident that the unusual circumstances surrounding these two cases make them interesting in several ways.

To begin with, the framing of these cases as part of the joint criminal enterprise undertaken in Mauthausen, as established in the parent case, shows how extremely rigidly military courts applied the 'common design' theory of guilt in the aftermath of World War II. Espinosa, Nava, González, Fernández and Félez did not belong to the Nazi military or civil administration that designed and put into effect the machinery of Mauthausen. Rather, they were trapped in it. Victims of the Nazi system themselves, their conduct was arguably the result of a combination of self-preservation and brutalization, perhaps to be expected given the harsh living conditions they had to endure as inmates. However, the judgment did not take this factor into consideration nor any other element related to it that could have allowed for a mitigation of the sentence, if not for the exclusion of responsibility. Fortunately, the inflexibility of this criterion was later tempered, which enabled a fairer approach when applying the theory of joint criminal enterprise.

Another interesting feature of these trials is the remarkable disregard for basic due process guarantees showed by the military courts trying these two cases. Although it is not the aim of this analysis to establish the degree of meticulousness followed by military courts and commissions trying war crimes in the years after World War II, the due process point nonetheless warrants attention. The pressure to punish thousands of alleged perpetrators likely led courts to put aside 'burdensome' details such as due process in order to increase efficiency. However, it is also true that these two cases were more difficult than most of the trials the military courts carried out, for two reasons. One was language. The United States military courts were supposed to try mainly German nationals, so, in the 'Spanish Kapos' trials, the lack of Spanish-speaking personnel lead to improvization. The other complicating factor was that the defendants came from Spain, a 'neutral' country (albeit with Axis sympathies) and one that did not seem to care about the destiny of five people who had fought against the government in power. Therefore, no serious cooperation with Spain was possible in order to provide the defendants

with lawyers or supervise the course of proceedings. Again, a calmer analysis of the circumstances at the review level allowed for the correction of the mistakes made at trial, which benefitted Laureano Nava, who had his sentence to life imprisonment reduced after proving that it had been imposed on the basis of only two witness testimonies.

The most remarkable contribution of these cases to international jurisprudence concerns jurisdiction. The fact that the defendants were not nationals of an Axis country but of a neutral state somehow seemed to challenge the authority of US military courts. To overcome this hurdle, universal jurisdiction was invoked. This seems to have been an exceptional use of the principle. In fact, considering that as former members of the Republican Army, the five defendants did not get protection from Spain, or from any other country, they actually faced trial as de facto stateless persons. Therefore, this was arguably the first time that the principle of universal jurisdiction was used to justify the trial of stateless persons.

There is also a significant lesson to be learned from these cases when it comes to the use of universal jurisdiction by third-country courts. The 'Spanish Kapos' cases are a puzzling example of the results yielded by an 'industrial' justice system such as that set up to deal with the horrors of World War II. Scant consideration of individual circumstances is an unfortunate feature of such a justice system. This can only lead to injustice. The possibility of a serious miscarriage of justice might go some way to explain why the United States' main concern was to justify their jurisdiction in order to avoid future claims as to the trials' legitimacy. However, a wider and more complex approach to the specific circumstances of the Spanish defendants would have been desirable. Obviously, circumstances surrounding the contemporary use of universal jurisdiction are very different: it is applied by domestic courts sitting in countries that do not need to be rapidly reconstructed, as Germany was in the aftermath of World War II, nor need justice be done expeditiously. Nevertheless, it implies that foreigners will be tried by a court that may not speak the language or may not know the context in which crimes were perpetrated. As the 'Spanish Kapos' trials illustrates, great care must be taken when dealing with universal jurisdiction cases in order to guarantee due process and provide real justice.

6

A Narrative of Justice and the (Re)Writing of History: Lessons Learned from World War II French Trials

Dov Jacobs[*]

(I) Introduction

Issues of post-conflict justice, broadly defined as the study of how new political regimes deal with the crimes of previous, were traditionally dealt with in a fragmented way by different disciplines. While historians, sociologists and jurists from various countries have studied these issues, discussions on post-conflict justice have only relatively recently been taken up by international lawyers and have acquired considerable momentum in the past decade.[1] This interest from international law mirrored the development of a new discipline, that of transitional justice.[2]

However, despite the bridges that now exist between international law, and more specifically international criminal law, and other disciplines, there is a surprisingly low level of historical self-reflection among international criminal lawyers on their core object of research, namely mass crimes and the difficulty of prosecuting them. In other words, and to put it more bluntly, international criminal lawyers, and more generally a number of transitional justice academics, often give the impression of re-inventing the wheel on the methodological and conceptual difficulties facing them. With the notable exception of the Nuremberg trials,[3] international criminal

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[1] For a precursor and seminal work by international lawyers on this question, see D. Alexander and Cherif Bassiouni (eds), *Post-Conflict Justice* (Boston, MA and Leiden: Hotei Publishing, 2002).

[2] Neil Kritz (ed), *Transitional Justice* (Washington, DC: United States Institute of Peace, 1995) is one of the first 'codifications' of this new field and Ruti Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000) is considered to be the seminal book on the topic. For a discussion on the difficulties of actually establishing transitional justice as a coherent new field of research, see Christine Bell, 'Transitional Justice, Interdisciplinarity and the State of the "Field" or "Non-Field"', *International Journal of Transitional Justice*, *3* (2009), 5.

[3] See, among a number of works on Nuremberg, D. Blumenthal and T. McCormack (eds), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?* (Boston, MA and Leiden: Martinus Nijhoff Publishers, 2008) and more recently Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: Oxford University Press, 2011).

lawyers tend to draw little help from historical examples of how to deal with collective crimes, and even less so of national examples.

This chapter will propose to do this in relation to the trials that took place after World War II (WWII) in France to prosecute those deemed to have collaborated with and actively promoted the agenda of the Nazi occupiers. The following sections will therefore not be a comprehensive discussion of how France dealt with the *épuration* of its private and public sector through a number of administrative and judicial sanctions.[4] They will rather try to illustrate the issues that practitioners today need to grasp when dealing with past atrocities. To do that, the chapter will first deal with the challenges facing the new post-WWII government when trying to set up the legal framework to try the collaborators (section II). It will then highlight the difficulties of such judicial proceedings with two examples, the trials of political leaders Pétain and Laval (section III). The chapter will conclude with some general thoughts, most notably on the evasive question of historical truth (section IV).

(II) Dealing with Acts of Collaboration: Setting up the Legal Framework

Having exposed the general context of the discussion (1), this section will present the legal framework that was set up to try collaborators. This included both the use of existing provisions of the Criminal Code (2) and the creation of a new offence, that of *indignité nationale*, or national indignity (3).

(1) The general context

Discussions on how to deal with the *épuration* of those Frenchmen who had collaborated at one level or another with the occupiers started some months before the end of war in committees specially created by De Gaulle. Two of those, the *Comité Général des Etudes* and the *Comité National Judiciaire*, worked together to produce a memo in February 1944 that outlined the legislation that could be put in place after the liberation.[5] As is often the case in such circumstances, the passions of the five-year conflict and occupation created pressure on the committees to show the utmost severity in relation to those who had helped the Nazis.[6] However, the

[4] The term '*épuration*', which can be translated as 'purge' or 'purification', designates the general policy of 'cleaning up' the country that took place in France after the war. It only partly corresponds to the practice of lustration that has been promoted, most notably in the former soviet bloc, to deal extra-judicially with former members of the regime and various human rights offenders. In this sense, it is preferred to use the French term in the remainder of this chapter, because of its wider scope of application and because of the light it sheds on the 'moral' state of mind of those who implemented this policy.

[5] Robert Aron, *Histoire de L'épuration*, Vol. 3(2) (Paris: Fayard 1969), 45–71. These committees were also in charge of formulating post-war policies for dealing with the various lawyers and judges who tried to minimise the effect of Vichy decisions during occupation.

[6] Such severity can be illustrated by the following draft proposal circulated at the time: '[W]ill be sentenced to death whoever, by his words, writings or example will have helped the objectives of the enemy to bring the French to collaborate in its actions' (cited in Aron, above n 5, 80).

preamble of the joint working document submitted by the committees indicated that the drafters had decided to adopt a more balanced approach, and try to reconcile the requirements of punishment with respect for the rights of the accused.[7]

One of the questions that had to be answered by the committees was the legal basis for the trials. At the heart of this debate was the principle of *nullum crimen sine lege*, a recognized principle of criminal law, and in the case of France, a principle that had been strongly defended during the French Revolution. Indeed, the Declaration of the Rights of Men and of the Citizens of 1789 famously provides that: 'A person shall only be punished by virtue of a law established and promulgated before the offence.'[8] The lesser-known Declaration of the Rights of Men and of the Citizens of 1793 presented things in a more emphatic way:

> No one ought to be tried and punished except after having been heard or legally summoned, and except in virtue of a law promulgated prior to the offence. The law which would punish offences committed before it existed would be a tyranny: the retroactive effect given to the law would be a crime.[9]

This principle was enshrined in the French Criminal Code which was in force at the time.[10]

In light of this, the committees elaborated a normative framework that tried to satisfy both the requirements of legality and the demand for punishment. It was accepted that there were essentially two categories of collaborators: those who had directly helped the occupants, to whom the existing Criminal Code was applicable; and those who had indirectly helped the occupants, for whom a new legal framework needed to be designed.[11]

(2) The application of the existing provisions of the French Criminal Code

For the first category of collaborators, it was deemed that, to a large extent, the existing provisions of the Criminal Code on treason and offences against the security of the

[7] 'The need for sanctions after the victory against the French who, in one way or another, provided help to the activities and the manipulations of the enemy is not in doubt. However, repression, unfortunately necessary, must, whenever possible, reconcile two contradictory objectives. It must be effective and swift to satisfy the national conscience and prevent spontaneous reactions that would necessarily be rough and would risk being unfair; it must be fair, i.e proportional to the guilt and organised in such a way as to allow to determine that guilt with accuracy and that respect for the rights of the accused and the defence not be sacrificed' (cited in Aron, above n 5, 82).

[8] Article 8, Declaration of the Rights of Man and Citizen (1789), available in English at <http://www.hrcr.org/docs/frenchdec.html> (accessed 3 March 2013).

[9] Article 14, Declaration of the Rights of Man and Citizen from the Constitution of Year I (1793), available in English at <http://www.columbia.edu/~iw6/docs/dec1793.html> (accessed 3 March 2013).

[10] Although the formulation has changed in the course of several reforms in the past decades, the principle remains the same and is today framed as '[c]onduct is punishable only where it constituted a criminal offence at the time when it took place' (Article 112–1, French Criminal Code, available in English at <http://195.83.177.9/code/liste.phtml?lang=uk&c=33> (accessed 3 March 2013)).

[11] Aron, above n 5, 83.

state could be applied to acts committed during the war. More specifically, the general framework of Article 75 of the Criminal Code was to be used. This Article provided for the prosecution of acts of collaboration with a foreign power famously labelled as 'intelligence with the enemy'.

Several interpretative ordinances were issued by the provisional government to ensure the effectiveness of the application of the Criminal Code to the situation of occupied France. These ordinances illustrate a clear will on the part of their drafters to leave as little room as possible for acquittals. First, it was declared that the provision of information relating to members of the *résistance* should be considered as affecting national security as provided for by Article 83 of the Criminal Code.[12]

Second, it was considered that, because of the illegality of the Vichy regime persons acting according to orders of the government, or in application of a legislative measure, could not benefit from the traditional defences that would normally attach to such a situation 'if the accused personally had the opportunity of not executing the order and where his responsibility or his moral authority was such that by refusing to act he would be serving the nation'.[13] Third, acts committed against France's allies could be assimilated to acts committed against the French state itself, thus allowing the consideration of these acts under the relevant provisions of the criminal code. The Ordinance of 26 June 1944 even went as far as to consider that for the purposes of the application of the Criminal Code, the troops of Allied forces were to be considered French troops.[14]

(3) *Indignité nationale*: A new offence to capture the essence of the *épuration*

The second category of persons—those that could be considered to have indirectly collaborated with the Nazis—gave rise to more difficulty than the first. On the one hand these were acts that could not, even with a wide interpretation, fall within the scope of the existing French Criminal Code. On the other hand, some of these acts, even if they could be labelled as offences against national security, would warrant a penalty that would be far too harsh in relation to the minor gravity of the actions. In other words, applying the Criminal Code to all instances of collaboration would be too lenient in some cases and much too severe in others.[15] Despite this, the drafters of the laws of *épuration* were reluctant to let the 'small fish' get away because they had also, by their actions, or even inaction, contributed one way or another to the dishonour of the country. In order to reflect this, therefore, the drafting committee provided the following solution, that of the creation of a new offence of *indignité nationale*, defined in the proposal as 'the situation in which has placed himself a person who, directly or indirectly, had voluntarily

[12] Ordinances of 17 and 31 January 1944.
[13] Peter Novick, *L'épuration Française, 1944–1949* (Paris: Balland 1985), 234.
[14] Novick, above n 13, 235.
[15] Aron, above n 5, 83.

helped Germany or its Allies, or affected the unity of the nation or the liberty or equality of the French'.[16]

It goes without saying that this new offence raises some important questions in relation to the legality principle, and the drafters of the Ordinance were aware of these difficulties. How did they therefore justify the new law in relation to non-retroactivity? One can identity three main justifications. First, the *indignité nationale* did not constitute a sanction in the criminal sense, but was rather a series of civil sanctions, such as the prohibition to be a state employee, and therefore did not fall within the scope of application of the principle of non-retroactivity of criminal laws. This justification is certainly unconvincing in light of how modern human rights law defines the scope of criminal sanctions,[17] but appeared in the official explanatory memorandum of the law that accompanied its adoption.[18] The second justification, while accepting that this indeed constituted a new offence, considered that it was acceptable because it provided for more lenient sentences than the Criminal Code for persons who would be prosecuted under the former rather than the latter, and therefore did not violate the principle of non-retroactivity which allows for the retroactive application of more lenient laws.[19] This explanation, put forward, among others by famous jurist and future drafter of the Universal Declaration of Human Rights René Cassin, is somewhat more elegant than the first one, but is in fact equally unconvincing. Indeed, for one, it only applies to cases that would fall within the scope of both the Criminal Code and the law on *indignité nationale*. Persons who could not have been prosecuted under the stricter provisions on national security cannot seriously be said to be benefitting from a more lenient law, because without that law they would not have been prosecuted at all. Second, technically this justification would only work if the new law replaced the former one, which was not the case. It was perfectly within the powers of the charging authorities to choose to prosecute under the Criminal Code, despite the existence of the law on *indignité nationale*. The argument would be more acceptable if, *de minimis*, the law had provided some form of immunity from prosecution under the Criminal Code for persons held responsible under the new offence.

[16] Peter Novick, above n 13, 237. The new offence was adopted by an Ordinance dated 26 August 1944.

[17] For example, it is settled case-law of the European Convention on Human Rights that what is 'criminal', and therefore triggers the fair trial protections of Article 6 of the Convention and arguably the protection against non-retroactivity of criminal laws and sanctions contained in Article 7, cannot solely depend on the qualification under national law. Instead, the Court established a series of independent criteria: (1) the classification of the offence in the national system; (2) the nature of the offence; and/or (3) the severity of the penalty imposed (see *Engel and others v Netherlands*, Judgment, 8 June 1976, §82–3). Applying these criteria, the Court has more particularly found that the fair trial protections apply in lustration cases, even when the national legislation might characterise such proceedings as 'civil' rather than 'criminal' (*Matyjek v Poland*, Decision on Admissibility, 30 May 2006, §42–59). More specifically, the Court found that the prohibition of holding certain functions or public office for a long period of time could be considered a sanction of sufficient gravity to warrant the application of Article 6 (*Matyjek v Poland*, Decision on Admissibility, 30 May 2006, §54–6). In light of this, there is little doubt that the French law on *indignité nationale* would be considered as a 'criminal' matter under the European Convention on Human Rights framework, thus imposing the application of the non-retroactivity principle of Article 7 of the Convention.

[18] Aron, above n 5, 94.

[19] Peter Novick, above n 13, 250, n 15.

The third justification, and probably the least convincing from a legal point of view, in fact corresponds most neatly to the drafters' state of mind. For some, the *indignité nationale* was not really an offence, but a fact, or more precisely a 'state' in which a person found himself after having acted in a certain way. This state was not to be technically determined by a judge, but rather certified as a given. The state therefore pre-existed the legal concretisation and therefore could not violate the non-retroactivity principle. This justification adequately highlights the teleology of the *épuration*. Some people, through their actions, had brought shame not just to themselves, but to France as a nation. It was therefore considered as legitimate, if legally dubious, for the French Republic in return to declare that these citizens were not worthy of the same rights as other citizens.

(III) Pétain and Laval: The Trials of the Leaders

The trials of Pétain and Laval illustrate the difficulties of trying the leaders of a former regime, especially when undertaken by political opponents. Both these trials came quite late in the process of *épuration*, to the concern and frustration of a number of commentators who thought that logically, these trials should have come first because without the condemnation of those who had led the country to collaboration, the trial of all other collaborators did not make sense. However, for pragmatic reasons, it was deemed that the new government could not afford to wait for the complex issues surrounding the trial of such senior political figures to be resolved before starting the process in the rest of the country. The trial of Pétain came first, and took place from 23 July until 15 August 1945. The trial of Laval followed some time later, from 4 October until 9 October 1945.

Both trials followed the same format. They were held before the *Haute Cour de Justice* (High Court), a special body set up within the Senate under the Constitution of the Third Republic to try high public officials for acts against the state.[20] This Court was abolished by the Vichy regime[21] and re-instated by the Provisional Government by a November 1944 ordinance to try the high-ranking collaborators.[22] However, the Provisional Government did not follow the previous rules pertaining to the composition of the High Court. Rather than being composed of members of the Senate, the Court had three professional magistrates[23] and a jury of twenty-four members.[24] It is interesting to note in relation to the composition of the jury that half were drawn from the Parliament, while the other half were

[20] *Loi du 24 février 1875 relative à l'organisation du Sénat*, Article 9.

[21] *Acte constitutionnel no 5 du 30 juillet 1940 relatif à la Cour suprême de justice*.

[22] Maurice Garçon, *Le Procès Pétain, Compte-Rendu sténographique du Procès* (Milan: De Vecchi 2007), 30.

[23] Judge Mongibeaux, First President of the *Cour de Cassation*, Judge Donat-Guigne, President of the Criminal Section of the *Cour de Cassation* and Judge Picard, First President of the Appeals Chamber. These three judges sat on both trials.

[24] This derogatory composition of the High Court was raised, to no avail, by Pétain's defence as a challenge to the legality of the proceedings (Garçon, above n 22, 17).

chosen from citizens who 'during the war, demonstrated a patriotic and resistant attitude towards the enemy'.[25] This composition certainly helps to explain the apparent lack of impartiality of the proceedings.[26]

The study of these trials and the circumstances surrounding them highlights a number of features that are common to proceedings of this nature in any transitional setting. More specifically, one can identify the following issues of interest: the symbolic dimension of the trials (1); the related desire of the accusers to (re)write history (2); and finally the ambiguity of the process (3).

(1) The symbolic dimension of the trials

Trials of high-level leaders always carry a symbolic charge and situate themselves at the crossroads of a number of extra-legal stakes of a political, sociological and performative dimension.[27] The trials of Pétain and Laval were no different. However, while both trials provided the opportunity for the new government to tell its own story of the war,[28] their symbolism was performed on different levels.

Pétain's trial was in many respects more symbolic of the general failure of France. Pétain represented the regime and its systemic illegality. In this sense, Pétain was in a way just an excuse to point out that Vichy was an illegitimate government and that De Gaulle represented the 'true' France that fought on. This collective dimension of the Pétain trial is illustrated by the will of the government to hold a trial *in absentia*. Indeed, it appears that Pétain's absence (he was being held in Germany) was seen as a positive development rather than as an obstacle. Conducting the proceedings without Pétain 'would have allowed for the French justice to issue a national judgment without the opportunity for the defendant to explain himself or be represented'.[29] The desire not to have Pétain present was all the more strong, that a number of opinion polls done in the early months of 1945 showed that French public opinion was not uniform in relation to what to do with the former leader of the Vichy regime and that he was in fact a divisive figure.[30] Pétain himself clearly expressed his desire to face his responsibilities[31] and returned to France

[25] Garçon, above n 22, 9. [26] See section III (3) below.

[27] For comprehensive studies on the multi-faceted dimensions of war crime trials, see more particularly: Mark Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge Univeristy Press, 2007); Mark Osiel, *Mass Atrocity, Collective Memory and the Law* (Piscataway, NJ: Transaction Publishers, 1999) and Gerry Simpson, *Law, War and Crime* (Cambridge: Polity, 2007).

[28] See section III (2) below.

[29] Aron, above n 5, 451.

[30] Roger Maudhuy, *Les Grands Procès de la Collaboration* (Saint-Paul; Souny, 2009), 207. (Describing how, when Pétain walked into the court on the first day of the trial, those present rose, and the guards stood to attention (*garde à vous*) out of respect). This risk of divisiveness was felt by De Gaulle himself, who wrote in his memoirs that '[a]lthough it appeared to me necessary from a national and international point of view that the French judicial system issued a solemn verdict, I wished that some incident would keep away from French territory this 89-year-old defendant, this leader previously adorned with significant dignity, this old man in whom, during the catastrophe, a number of French citizens had put their trust and for whom, despite everything, they still felt respect or pity': Charles de Gaulle, *Mémoires*, Tome III (Paris: Plon, 1959), 111.

[31] In a letter to Hitler dated 5 April 1945, Pétain declared: 'I cannot, without violating my honour, let it be believed, as is suggested by some propaganda, that I sought refuge in a foreign land to escape

through Switzerland in late April 1945.[32] The ambivalent public opinion found its way in the actual judgment of the High Court, which, while condemning Pétain to death, also expressed the 'wish' that he in fact not be executed. The judgment itself only mentions Pétain's age as the reason for this rather peculiar 'wish', but it appears that in fact it was the result of a broader disagreement during the deliberations, with the judges suggesting a term of five years of banishment and the death penalty only being imposed by a one-vote majority among the jurors themselves.[33]

As a final testimony to the fact that for a number of people, it was the regime, not the man himself that was on trial, it is interesting to read De Gaulle's take on the trial. While he considered that it was absolutely necessary to hold it because Pétain 'had symbolised what was the surrender and, even if he himself had not exactly wanted it, the collaboration with the enemy', he nonetheless recognised that the man himself deserved some indulgence for the services he had rendered to France over his life.[34] This attitude explains why De Gaulle eventually commuted Pétain's death sentence, following in this way the 'wish' expressed by the High Court.

Such lenience was not extended to Laval. While Pétain represented treason in a broad sense, Laval represented, in addition to treason, the more active spirit of collaboration. While French public opinion was divided on Pétain:

> in 1945, [Laval] was still one of the most hated men in France. He is seen as the most responsible of the debasement and troubles of the country: choice of collaboration and its procession of compromises, temptation of military collaboration, forced labour, requisitioning, police abuses . . . all sides agreed on his faults.[35]

In addition, his case was not helped by the fact that he had been dismissed by Pétain in December 1940, only to be invited back as head of government in April 1942 at the urging of the Nazis, thus confirming the impression that he was a willing agent of the occupant.

(2) The narrative goals of the prosecution

The way both trials were conducted highlights the motives behind the prosecution case. The main goal was to provide a two-pronged narrative. On the one hand, Pétain and Laval had wanted the defeat of France and had acted in that direction before the war. On the other hand, the regime that was set up as a result was illegal and illegitimate.

my responsibilities. It is in France alone that I can answer to my actions and I am the only judge of the risks that this attitude could carry': reproduced in Bénédicte Vergez-Chaignon, *Histoire de L'épuration* (Paris: Larousse, 2010), 491.

32 It appears that upon hearing news of the arrival of Pétain in Switzerland, De Gaulle made informal requests to the Swiss government that they in fact refuse to extradite him, so that the trial *in absentia* could take place, but that this was not followed with effect: Jacques Isorni, *Pétain a sauvé la France* (Paris: Flammarion, 1964), 14.

33 Maudhuy, above n 30, 214.

34 Charles de Gaulle, *Discours et Messages*, Vol. 2 (Paris: Plon 1974), 293–4.

35 Bénédicte Vergez-Chaignon, *Histoire de l'épuration* (Paris: Larousse 2010).

The first aspect of the story was necessary in the context of the narrative that aimed at finding those responsible for the defeat. This is a natural tendency of any regime. There is no luck in defeat, neither is the answer to be found in the success of the enemy. Someone within the country is responsible. This is why a large portion of both trials was devoted to identifying conduct before the war that might be read as preparing for defeat at the hands of the Nazis. In relation to Pétain, the prosecution argued that in the years preceding the war, he had organised a conspiracy to establish a dictatorship in France, inspired by Franco, and with the financial help and promise of military support from the Nazis.[36] This theory appears, in hindsight, to be based on no tangible evidence. The accusation was based on the statement of a person that had been found to be lying repeatedly in other instances[37] and, according to one of the members of the jury at the time, no proof of such a conspiracy was ever put forward during the rest of the trial.[38] In fact, the judgment itself, while it generally condemns Pétain for his collaboration with the Nazis, and for the dubious choice of men to lead the country with him, also states that 'even if strong presumptions can be drawn against Pétain because he invited into his various governments men that were part of factious movements, there is not sufficient proof that there was between him and them a real conspiracy against the security of the State'.[39] As for Laval, he was, on the first day of his trial, asked to explain his anti-war stance before the war which had been a 'policy of annoyance, of reduction of the war potential of France',[40] and his declarations that predicted the victory of Germany and the defeat of the United Kingdom.

The difference in approaches in both trials can be easily explained by the fact that, while Pétain was essentially absent from political life in the years preceding the war, and could therefore not be found to have made suspicious statements pointing to a conspiracy, Laval was an active member of several governments and had therefore a clear political position that he could be held accountable for in hindsight.

The second aspect of the story was equally crucial for the new government, both politically and legally. From a political perspective, it could not be accepted that the French Republic had voluntarily relinquished power to Pétain and Laval. This would lend the Vichy government a legitimacy that was not compatible with the idea that the real government of France was represented by De Gaulle and his supporters in exile. This is why both trials went to considerable length to show that power was acquired by political manoeuvring. Interestingly, the date chosen for what the prosecutor in the Laval trial called a '*coup d'état*'[41] was not Pétain's acquisition of the full powers by the Assembly on 10 July 1940, but his accession to the Presidency of the Council at the invitation of the then President of the Republic, Reynaud, on 16 June 1940. This had the corollary effect of voiding the Armistice that was signed on the 25 June, which was one of the main narrative goals of the

[36] Garçon, above n 22, 33–4. [37] Aron, above n 5, 454. [38] Maudhuy, above n 30, 212.

[39] The full judgment is on file with the author. This finding of the High Court once again shows that Pétain, as a person, was never in fact the real target of his own trial. See section III (1) of this chapter.

[40] Garçon, above n 22, 44. [41] Garçon, above n 22, 12.

new government, as explained by De Gaulle in his memoirs[42] and confirmed by Delattre, one of the jury members for the Pétain trial: '[The Trial] must be resituated in its context: in 1945, in the eyes of the *gaullistes*, the armistice was a crime and the main crime committed by Pétain.'[43]

This narrative also had legal consequences. As previously outlined,[44] it allowed the drafters of the laws of *épuration* to provide that a person could not raise as a defence that he had acted in accordance with a law enacted under the Vichy Government. Moreover, the nullity of the Armistice had equally far ranging consequences. For one, it directly allowed the application of the provisions of the Criminal Code on intelligence with the enemy. If the Armistice was legal and put an end to the war, this could not be invoked.[45] Second of all, and more theoretically, it meant that De Gaulle himself could not be prosecuted for his actions during the war that were in contradiction to the terms of the Armistice.[46]

(3) The ambiguities of the process

A common feature of both trials, and of many of the trials of the *épuration*, was the difficulty of establishing a fair process. This difficulty had two dimensions: the first one relating to the partiality of the proceedings and the second one, which is partly linked to the first, relating to the role of the accusers during the war.

In relation to the partiality of the proceedings, it appears that the investigations were hasty and incomplete. The Pétain trial had been prepared with the absence of the accused in mind, and with therefore little work done on the provision of defence rights because no opposition was expected. His return to France led to the reopening of the file and the haphazard addition of a number of documents.[47] It even appears that some evidence was removed because it would not have resisted examination by the defence.[48] In the Laval trial, the accused complained repeatedly that he was not allowed to request additional investigations to bolster his case, to which the prosecutor amazingly and unashamedly responded that 'the Pierre Laval affair could have been brought to court without the need to have it preceded with a judicial investigation, because, the investigation started the day of the accession to power of Pétain and Laval, as his second-in-command'.[49] This was hardly an indication of the fairness of the proceedings.

[42] 'What in the indictment appeared fundamental for me, was less so for many. For me, the capital offence of Pétain and of his government was to have concluded with the enemy, in the name of France, the so-called "armistice" ': reproduced in Aron, above n 5, 533.

[43] Maudhuy, above n 30, 210.

[44] Section II (2) of this chapter.

[45] This was raised by Georges Suarez, a journalist sentenced to death for intelligence with the enemy. The French Cour de Cassation found, however, with reference to the Hague Conventions, that an armistice was only a suspension of hostilities and therefore still constituted a war for the purpose of the application of Article 75 of the Criminal Code.

[46] Aron, above n 5, 90.

[47] Vergez-Chaignon, above n 35, 491.

[48] Aron, above n 5, 453–4.

[49] Garçon, above n 22, 13. The Prosecutor repeated this statement in his closing arguments, stating that no investigation was necessary to establish the obvious criminal nature of the acts of Vichy: at 268–9.

This lack of fairness was made more obvious by the passion surrounding the trials, which surely influenced its active participants. In that respect, the Laval trial stands out once again for its partiality. Two examples can be given. At the end of the first day of hearings, when Laval was taken from the courtroom, someone in the audience clapped. The Presiding judge asked for that person to be removed, at which point, one of the jury members cried out 'he deserves, like Laval, to receive twelve bullets'. There were no consequences for the juror.[50] Given the composition of the jury which, as explained previously, contained individuals who had actively fought against the Vichy regime during the war, such statement is not surprising. However, any minimal attachment to notions of impartiality should at least have led to the removal of this particular jury member. The second example can be found in the prosecutor's closing address, in which he lamented that Laval was not summarily killed through an act of 'popular justice' when visiting Paris in August 1944.[51]

In relation to the accusers, both Pétain and Laval pointed out repeatedly that they were being tried by persons who had held their positions during the Vichy Government. In his opening statement, one of Pétain's lawyers pointed out that Pétain was being judged by those who had sworn allegiance to him. These judges had, during the period of the war, 'rendered judgments and pronounced sentences in the name of [Pétain], head of the French state; speaking in his name and in application of the powers that he had conferred upon them, they ordered that the representatives of the police forces execute the judgments they were issuing'. In this context, how could the judges not be perceived as being partial?[52] In a similar fashion, Laval interrupted the opening statement of the prosecutor with the following remark: 'But you were all under the orders of the government at that time, you who are judging me, magistrates, and you, General Prosecutor'.[53] This perceived partiality of the judges explains Pétain's position at the outset of the trial, where he declared in an opening statement that:

> [I]t is the French people who, through its representatives, brought together in the parliament, on the 10 July 1940, brought me to power. It is to this people that I came to answer to. The High Court, as it is currently composed, does not represent the French people, and it is to it, and only it, that the *Maréchal de France* and the Head of State speaks today.[54]

(IV) Lessons (to be) Learned

This final section will bring together the preceding analysis and try to draw some general lessons both for the evaluation of the system of the *épuration* and, in line with the objective outlined in the introduction, for situations that may arise today. These lessons relate both to the legal dimension of post-conflict trials (1) and to the narrative function of these trials (2).

[50] Garçon, above n 22, 99.
[51] Garçon, above n 22, 307.
[52] Garçon, above n 22, 25.
[53] Garçon, above n 22, 13.
[54] Garçon, above n 22, 41.

(1) The legal dimension of post-conflict trials

What becomes apparent from this impressionistic overview of the way that France dealt with the *épuration* of those who had collaborated with the Nazi occupiers, is that those who conceived and implemented the legal framework were faced with some universal dilemmas that required the balancing of a number of issues. As indicated earlier, there was a need to satisfy the collective desire for vengeance with the requirements of justice.

In relation to the applicable law, the analysis shows the difficulty in achieving this balance. The trials required the setting up of a legal framework that had to compromise the principle of legality and required, for it to be operational, some creative reappraisal of the situation that existed at the time, as is the case with the nullity of the Armistice.

These conclusions find an obvious echo in debates that have surrounded the retroactive application of international criminal law. While the creation of the International Criminal Court and its explicit application only to acts committed after its entry into force[55] has alleviated some concerns in relation to this problem, the issue still arose and arises in cases where ad hoc tribunals are created. The Nuremberg Judgment famously held that the principle of legality was:

> [Generally] a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.[56]

In other words, the principle of legality is merely a relative principle that needs to give way to the requirements of justice. The way this issue was resolved in relation to the Former Yugoslavia and Rwanda tribunals was to claim that the existence of the crime under customary law satisfied the requirements of the principle of legality.[57] This line of reasoning was validated at the European Court of Human Rights.[58]

While this intellectual construction can be questioned in a number of ways,[59] the increased codification of international crimes and their growing implementation in national legal orders means that the issue is less likely to arise in the future. It is nonetheless important to recall it as an illustration of the grey zone between law and

[55] Article 11(1), Rome Statute.

[56] The Judgment of the International Military Tribunal for the Trial of German Major War Criminals (30 September and 1 October 1946), 217.

[57] See *Report Of The Secretary-General Pursuant To Paragraph 2 Of Security Council Resolution 808 (1993)* UN Doc. S/25704, 3 May 1993 at §34 ('In the view of the Secretary-General, the application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law').

[58] *Kononov v Latvia*, ECtHR Grand Chamber, 17 May 2010.

[59] From a very pragmatic perspective, the documentary and methodological complexities that a number of international tribunals have been faced with when establishing the content of customary law in a number of cases makes the argument that the defendant should therefore have known that his acts were criminal at the time highly theoretical. Only if he himself had at his disposal an army of legal assistants to assess the national legislation of dozens of countries and the specific (and

morality that more generally permeates the fields of human rights and international criminal law.

In relation to the fairness of the proceedings, it becomes apparent from the examples given that there is a very fine line between what is now being called 'local ownership' of the process and partiality of the process. The thinly veiled call for murder from the prosecutor in the Laval trial highlights the passion that accompanies such proceedings. Moreover, the fact that the trials were conducted by judges who had served under the Vichy regime is equally representative of the risks of partiality. The study of such cases is therefore of interest for those studying the interaction between national and international courts in prosecuting mass crimes, and who are trying to find a balance between local ownership and the distance necessary for the process to be deemed fair.

(2) The narrative function of post-conflict trials

Beyond the legal dimension, the most important insight that can be drawn from the preceding discussion is how trials can be used to shape the narrative of a conflict. As discussed, behind the laws of *épuration* and behind the legal proceedings of the trials, lay a narrative that the new government wanted to promote. This narrative was that of the lack of continuity of the French state during the Vichy regime. Pétain had set up an illegal and illegitimate dictatorship, with the political, but also intellectual support of a number of French citizens. The obvious objective of such a narrative was to solidify the legitimacy of the new government of De Gaulle, and even more importantly, its legitimacy as the continuance of the French Republic throughout the war. Several comments can be made in relation to this narrative.

First of all, this is a clear example of re-writing of history with the benefit of hindsight. It is only with the victory of Germany, for example, that the pre-war fascist musings of an intellectual such as Brasillach take on a premonitory and conspiratorial dimension.[60] Equally, had the communists not become such a political force during the war, and the British such close allies, anti-communist and anti-British pronouncements would not have been held against a certain number of accused in the *épuration* trials.[61]

Secondly, the trials are a somewhat clear example of the victor writing history to fit his own narrative. The political and sociological reality of pre-war France was a

sometimes progressive) interpretations of a number of treaties and declarations of states, would the reasoning have any validity. For a comprehensive and critical discussion of the principle of legality in international criminal law, see Dov Jacobs, 'Positivism and International Criminal Law: The Principle of Legality as a Rule of Conflict of Theories' in Jean d'Aspremont and Jörg Kammerhofer (eds), *International Legal Positivism in a Post-Modern World*, (Cambridge University Press, forthcoming). Available at SSRN: <http://ssrn.com/abstract=2046311> (accessed 20 December 2012).

[60] On the trial of Robert Brasillach, see Alice Kaplan, *The Collaborator: Trial and Execution of Robert Brasillach* (Chicago: University of Chicago Press, 2001).

[61] On the various offences that were established based on a certain opinion, see François Rouquet, *Une Epuration Ordinaire* (Paris: CNRS Editions 2011), 145–62.

far more complex web of interests and tensions and the French defeat in 1940 was the result of more than the policies of a few 'traitors'.

Thirdly, it is a selective narrative. Indeed, in the same way that Nuremberg was essentially (at least at the beginning) about crimes against peace, the trials of the *épuration*, as illustrated by those studied in this chapter, were about treason and, more specifically, the crime that was the capitulation to the Nazis in 1940. There is, somewhat strikingly, very little mention of the Holocaust. The Laval indictment, and only then in an annex, mentions the anti-Jewish law merely as an example of the will of Laval in adapting the French regime to Nazi policy. The Pétain indictment does not even mention the persecution of Jews and the Court seemed unconcerned by the issue. When, after one week of discussions on the Armistice, a juror asked whether there would be any evidence of crimes committed in relation to the Jewish population, the prosecutor responded that:

> We will hear here some representatives of associations of victims that came out safe and sound—and I congratulate them for that—from the camps of Buchenwald, Dachau, etc. Their testimony will constitute what I call 'courtroom impression' more than actual arguments, because what matters in this trial, is to make a demonstration.[62]

These findings highlight the complex relationship between trials and history. While trials can be instrumental in historical work, they certainly cannot be considered as establishing history, as is sometimes argued today. Even if some of the anomalies of the post-war French trials are not reproduced in today's trials, there is a limit to the capacity of criminal trials to set a reliable (and complete) record of the past.[63] This difficulty is compounded by the fact that perceptions of history and expectations of the outcomes of criminal trials are fragmented. The narrative of the trials was not only selective, it was the selective choice of the new government, which only represented a fraction of the variety of interests of the French population at the time. In this sense, the 'local ownership' of the criminal process, as considered previously, is made more complex by the possibly conflicting hopes of what the process should achieve. This was illustrated by the difficulty experienced by the jury in fully adhering to the prosecutorial strategy in the Pétain trial. It was also impossible for journalists reporting on the trials to convey to their readership the complexities of a narrative that was essentially political, when they were expecting one that would mirror more closely their individual suffering.[64]

In light of this, while the initial reaction to the French trials, given the current success of the 'truth paradigm', could be criticism, one can wonder, taking a step back, whether truth is in fact such a relevant factor for the reconciliation that is sought by the trials. Not only is truth a relative concept,[65] but over-reliance on

[62] Vergez-Chaignon, above n 35, 495.

[63] Richard Ashby Wilson, *Writing History in International Criminal Trials* (Cambridge: Cambridge University Press, 2011).

[64] Vergez-Chaignon, above n 35, 492.

[65] Manuel Garcia-Carpintero and Max Kölbel (eds), *Relative Truth* (Oxford: Oxford University Press, 2008).

truth ignores the fact that national unity, which is one of the bases for reconciliation, is based not on truth, but on broadly accepted myths. In France, the myth of the *résistance* and the illegality of the Vichy regime was central to national identity. The fact that it took fifty years for a French president to recognise that the acts of Vichy were indeed the acts of France illustrates this.[66] One must wonder if, at the time, such a myth was not necessary for the country to move forward.

In other words, post-conflict periods must be seen in a diachronic rather than synchronic dimension, where different periods might require different narratives and institutional frameworks. France, again, exemplifies this. Following the initial push for harsh treatment, a number of 'softening' initiatives were introduced in subsequent years. A general amnesty was enacted in 1953.[67] Further, as mentioned above, the strict anti-Vichy narrative promulgated during the trials eventually gave way to a more nuanced historical record and the recognition that Vichy was also part of French history. Insisting on some form of objectified truth can in some cases lead to the reproduction of the societal tensions that were at the heart of the conflict in the first place. Only a reasoned analysis of the importance of post-conflict narratives, with their ambiguities, rather than an over-reliance on an illusory objective truth, can help academics and practitioners advance in the direction of the desired reconciliation.

[66] Declaration of President Chirac on the 16 July 1995, <http://www.nytimes.com/1995/07/17/world/chirac-affirms-france-s-guilt-in-fate-of-jews.html?pagewanted=all&src=pm> (accessed 3 March 2013).

[67] Aron, *Histoire de L'épuration*, above n 5, 45–71.

7

The Bordeaux Trial: Prosecuting the Oradour-sur-Glane Massacre

*Frédéric Mégret**

On 10 June 1944, a German column advanced towards the small village of Oradour-sur-Glane in the department of Haute-Vienne, Limousin region, in the south-west of France. It was composed of the 3rd company of the 1st battalion of Panzergrenadier of the 4th SS-Panzer-Regiment 'Der Führer' of the 2eSS-Panzer-Division 'Das Reich'. The division had left for Normandy almost as soon as news of D-Day had arrived. The Limousin region had been the theatre of many FFI (*Forces françaises de l'intérieur*) attacks, which had led to bloody reprisals. In Tulle alone, ninety-nine men had been hanged.

Oradour-sur-Glane was methodically surrounded. Villagers were ordered to assemble in the village square with their identification papers. Those who tried to flee were shot. Women and children were put on one side, men on the other. The men were then dispatched to six different locations, in front of which heavy machine guns were placed. At the sound of an explosion, they were gunned down, with the shooters often aiming for their legs. Some were then finished off at point blank range. The dead and dying were set on fire. At around the same time, the women and children were locked into the village church. A canister of asphyxiating gas was set up, which promptly exploded. The church was filled with black smoke. The Germans shot indiscriminately. Grenades were thrown in. The bodies were subsequently covered with straw and church chairs, and set on fire. The church bell melted under the temperature. The rest of the village was systematically plundered and set on fire.

Altogether, 648 people (245 women, 207 children including six below six months, and 196 men) were killed, although only fifty could be identified. A dozen managed to escape before being caught; five men managed to run away from a burning barn after being shot. One woman survived the church massacre after jumping from a church window, breaking her leg, and being shot by an SS soldier in the process (she

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was found the next day). She had lost her husband, her son, her two daughters and her seven-month-old grandson. The massacre was the worst in occupied France, one of the worst in Western Europe and on a scale comparable to some of the most dramatic mass executions of the Eastern Front.

In 1953, eight years after the massacre, the trial of Oradour-sur-Glane opened before a military tribunal in Bordeaux, composed of one professional civilian magistrate and six military adjuncts (who, according to law, had to be drawn in majority from the ranks of the resistance). Twenty-one members of the third company, out of sixty-four who had been identified as having been involved and still alive, were accused of being co-authors or accomplices to crimes of murder, acts of barbarity, voluntary arson and plunder. The trial elicited a passionate response in France and attracted considerable press interest. Of the twenty-one, fourteen were Frenchmen from Alsace-Lorraine who had been conscripted into the SS, thirteen by force. One German was sentenced to death, four to sentences of forced labour, and one was acquitted. Of the Alsatians, only the volunteer was condemned to death, nine to forced labour, and five to jail terms. Forced labour and prison sentences ranged from five to twelve years. Under very tense circumstances, a law of amnesty was voted by Parliament on 19 February 1953, which led to the liberation of those Alsatians who had been forcefully conscripted. This chapter analyses the legacy of the Bordeaux trial, a trial that is today somewhat forgotten even in France, but which is remarkably modern in terms of the dilemmas it raised.

(I) Historiography and the Problem of Context

The telling of the Oradour massacre is a delicate historiographical exercise.[1] Apart from the occasionally frankly revisionist writing, all accounts agree on the essentials of what happened, even though all concede that some facts must necessarily be the object of speculation. The survival of some key witnesses makes certain facts incontrovertible—for example, Mrs Marguerite Rouffanche provided a unique insight into what happened in the church since she was its sole survivor—whilst the death of many others means that some elements remain forever shrouded in mystery; the vast majority of victims, but also many of the key perpetrators, died in the months of combat that followed.

More significantly, all accounts must walk a fine conceptual line between focusing entirely on the massacre and trying to contextualize it. Too little context will not serve the needs of history, pedagogy or memory. The massacre was not a random event in the sense of being entirely arbitrary. It fitted into a pattern of actions

[1] There is a vast literature, mostly in France, dedicated to the Oradour massacre, although far fewer books on the Bordeaux trial itself. Leading examples of the latter on which this chapter draws are Jean-Jacques Fouché, *Oradour: la politique et la justice* (Saint-Paul: Souny, 2004); Guillaume Javerliat, *Bordeaux 1953, le deuxième drame d'Oradour: entre histoire, mémoire et politique* (Saint-Paul: PULIM, 2008); Jean-Laurent Vonau, *Le procès de Bordeaux: les Malgré-Nous et le drame d'Oradour* (Strasbourg: La Nuée Bleue, 2003); Douglas W Hawes, *Oradour–The Final Verdict: The Anatomy and Aftermath of a Massacre* (Bloomington, IN: Authorhouse, 2007).

against civilians, for example, characteristic of the violence of Nazi occupying troops, perhaps more common on the Eastern Front but increasingly transposed to the Western fringes of Europe as well. To miss that element would not do historical justice to the events of 10 June. Yet context is also tricky, and what one fits in that loose category as having been somehow relevant can raise delicate questions about what exactly was the meaning of that fateful day in 1944. There can also be such a thing as too much context, if an episode becomes disconnected from the genealogy of crimes against humanity, so particularized and over-explained by a sequence of events as to be trivialized.

At any rate, the massacre was not, so to speak, committed in a day. Rather, it was directly and indirectly linked to a complex series of circumstances. First and foremost, perhaps, the massacre is linked to the history of occupation, of which it constitutes one of the final, most desperate and bloodiest episodes. Germany occupied the northern half of France in 1940, with the Vichy Government being given formal authority over the southern zone as little more than a puppet regime. Nazi troops operated in occupied territory, in a context where significant sections of French society and the French 'state' were willing to cooperate with them, but where they also encountered significant resistance from a minority and a sullen opposition from many. The Limousin region was in that respect not unlike many regions of occupied France. It had significant maquis[2] presence, yet there were also many—including, most likely, the inhabitants of Oradour—who were simply trying to get on with their lives. Almost from the beginning, occupation was a ruthless affair, designed to subjugate and plunder the occupied areas.

A second element of context that seems crucial is the nature of the Waffen SS, since it provides the crucial link between the two regions that would prove so central to the Bordeaux trial: the Limousin and Alsace. The Waffen SS was the military arm of the SS, which had originally been created as a protection group for Hitler but had morphed into a veritable state within the state after his accession to power. It was an elite corps that demanded absolute allegiance to the Fuhrer. By 1944, the Waffen SS was not quite what it had once been as a fighting force, although it proved in Oradour and elsewhere that it was certainly a murdering force. It had suffered extensive casualties on the Eastern Front, where many of its regiments had been decimated. Although it may seem paradoxical that an elite unit traditionally based on rigorous selection of volunteers should have enrolled members forcefully and against their will, such was the situation by 1943 that it had to be less ideologically and racially rigorous. Given the SS's ambition to showcase Aryanism, it was natural that in occupied territory it would look for recruits who conformed to its racial stereotypes.

A third contextual element that is perhaps most problematic is Alsace. Some treatments of the Oradour massacre focus on Alsace more than others, in ways that seem to suggest that the crimes initially committed there by the Germans were the cause of subsequent atrocities that occurred 500 miles to the south-west; others portray Alsace as factually relevant but ultimately incapable of explaining something such

2 Literally, 'scrub', where the *Résistance* retreated to operate against the Germans.

as Oradour. This tension between those who place an emphasis on the problematique of Alsace and those who do not is still felt today, either implicitly or explicitly, and works on Oradour are still judged by many in the regions concerned on the basis of which side of the line they fall on. It is, at any rate, this fine line that the Bordeaux military court itself sought to tread, one that repeatedly threatened to engulf the trial and that would test reconciliation and national unity in post-war France.

Alsace was long a part of the Holy Roman Empire, but had gradually become a French province in the seventeenth and eighteenth centuries, particularly following the French Revolution. In 1871, after the French defeat in the Franco-Prussian War, it was annexed by the Prussians who proceeded to Germanize it. It was partly over Alsace and its sister province, Lorraine, that World War I was fought between France and Germany. Alsatians were conscripted by Germany in 1914, although many managed to escape to the French lines and switch sides. Alsace was returned to France in 1919 under the terms of the Treaty of Versailles following which it underwent a rigorous process of Francization. The difference between Alsace and the rest of France during World War II was that it was not merely occupied: it was de facto *annexed* by Hitler to Germany in 1940, thus fulfilling an old German desire for revenge, as well as fitting well with the Nazi idea of uniting all '*Volksdeutsche*' (ethnic Germans).

Needless to say, such forced national incorporation was in contravention of international law. Extraordinarily, and even though the Armistice said nothing to that effect, Maréchal Pétain, the World War I hero whose efforts largely led to Alsace (and Lorraine) coming back into the French fold, hardly protested this incorporation into Germany. This led many Alsatians to feel betrayed by France. The annexation was swift and brutal: civil servants were forced to swear allegiance to the Reich; the French language was banned (including French names); membership in the Hitler Youth was compulsory for those under eighteen and a border was set up with France. A re-education and security camp was created at Schirmeck-Labroque to deal with those resisting Germanization to which many suspected 'francophiles' were promptly sent, some on their way to further deportation.

(II) The Court and its Procedure

Defence for the German accused argued that only an international tribunal composed of the victors, the defeated and neutrals could judge them. Yet there was little doubt that, in the spirit of Nuremberg, the crimes had been committed in a specific location and should therefore be judged by domestic French courts. France had been quite keen to prosecute Germans and in the years following the war many had already been convicted.[3] The French framework for the prosecutions was attacked by the accused as incompatible with the London Agreement

[3] Claudia Moisel, 'Des crimes sans précédent dans l'histoire des pays civilisés: l'Occupation allemande devant les tribunaux français, 1944–2001', *Mémoires/Histoire*, *1* (2006), 186.

and the Nuremberg judgment. In rejecting this challenge, the Cour de Cassation, the highest French jurisdiction, found that it 'belongs to the French nation... to ensure through its tribunals and according to its legal rules the repression of those crimes that were committed on French territory, or against French nationals'. The French ordinance of 1944 and the law of 1948 contravened no provision of international law, since neither the London Agreement nor the Nuremberg verdict anticipated how crimes should be prosecuted in France, and in fact emphasized that they should be judged in the countries where the crimes had been committed 'according to the laws of these countries'.

A substantial amount of time had elapsed since 1944 when the trial began, which created opportunities even as it raised problems. On the one hand, the atmosphere was calmer than it would have been immediately after the war when thousands were executed in France outside any judicial process as a result of the sombre episode known as *épuration*. One Alsatian who had early on been identified as a participant at Oradour was tried, condemned to death, and almost lynched by a crowd in Limoges (he was subsequently released on appeal because he was a minor at the time of the events, but was retried in 1953 before the military court on a new legal basis). On the other hand, the passage of time meant that the overall political context was less favourable to prosecutions, and that even though the suffering was still very much alive in the Limousin (it arguably still is even today), some memories of actual facts had begun to blur. The Bordeaux trial also raised what have become familiar problems of pre-trial detention. Seven Germans and two Alsatians had, by the time the trial began, been held for nine years, whilst those not detained had gone on with their lives. The President of the tribunal was visibly irritated at trial by how long the accused had had to wait for their day in court.

The trial was conducted in a classic inquisitorial vein, characteristic of the French criminal procedure that has been somewhat less influential in contemporary international criminal justice. The *instruction* (judicial investigation) had occurred before the trial and led to a significant *dossier d'instruction* (judicial investigation file). It had started early after the massacre, the Vichy Government having protested to the Germans about the killings, and the Wehrmacht Command in France having complained to the SS about them. However, its work had been marred by the fact that it unfolded in a country in the midst of hostilities where questioning those involved was out of the question, and evidence was rapidly being lost. Moreover, the Wehrmacht had no jurisdiction over the SS, and even though SS General Lammerding apparently initiated an investigation, it predictably led nowhere. The investigation subsequently struggled to find those responsible in prisoner of war camps throughout Europe.

The presiding judge was omnipresent, at times cajoling and at times threatening. Prosecution and defence were consulted by him almost on a need basis. There was much direct, unmediated contact between the judge and the defendants, none of whom had the option to be silent. Interrogation of the defendants was on the basis of the *dossier d'instruction*. It has been claimed that the judge's first statement in the courtroom was for the gendarme to 'let the guilty enter'. Much of the defendants' interrogation by the judge was devoted to verifying things that they had said to

their interrogators (British and French) and which were in the dossier. Statements made years earlier by the defendants to military police and which they had since withdrawn were often held against them.

The defendants often claimed that they had never said some of the things that were in the dossier, or that they had not read their deposition at the time of signing it. There was evidence that some had consulted to come up with a common version that would exonerate them. Many changed their version of events during the investigation and during trial. Some hinted at having been brutalized by their interrogators, notably the British military police, but these claims were not pursued in court and their defence lawyers did not even seek to exclude the evidence supposedly thus obtained. They claimed that their recollection of events was sketchy, except when it came to evidence that might exculpate them. With the passage of time, however, some witnesses' own recollections had blurred.

As in previous and subsequent war crimes trials, both defendants and victim witnesses were tempted to make grand declarations about what they saw as the issues at stake rather than simply answer the judges' factual questions. Some of the defendants or their counsel emphasized the price Alsace had paid to remain French, whilst victims insisted that this issue was strictly irrelevant to what had occurred in Oradour. The President of the tribunal ignored them or cut them off, but it was hard not to get a sense of the deeper animosities and contradictions implicit in the testimonies. For the rest, much of the trial was dominated by factual issues and the complex attempt at reconstituting who had been where, when and doing what. The fact that there were so few survivors made it very difficult to ascertain who had done what, underscoring the sinister paradox that the more ruthless of war criminals—those who left none behind to testify—might also be those who stood the best chance of escaping conviction. Perhaps equally importantly, the trial focused on who knew what in advance, with a view to establishing premeditation or the lack thereof.

Contrary to the French tradition and because the court was a military one, victims were not represented and could not avail themselves of the *parties civiles* institution. Only a few seats were reserved for them, and they had none of the procedural rights that would normally have been associated with *parties civiles*, such as addressing the court or examining the investigatory file on which the case was based. Nonetheless, they had been closely associated at the earlier investigative stage and the presiding judge addressed them directly on several occasions, as if to recognize their huge stake in the trial.

Another forty-four defendants were also tried *in abstentia*, although they were hardly mentioned during trial and were seen as guilty by the prosecutor largely under the Law of Collective Responsibility,[4] even if they did not individually participate in killings. In some ways, this part of the proceedings would confirm the worst suspicions about the *in absentia* procedure for a lawyer trained in the common law tradition and wary of defendants effectively not in a position to defend themselves: all were condemned to the death penalty. Nonetheless, had

[4] See 'Organizational Guilt', Section VI below.

any been caught subsequently (none were), they would have been entitled to a retrial.

(III) Anti-Insurgency and Crimes against Humanity

To this day, the exact reason why the massacre was ordered remains unknown. In part this merely illustrates its absolute gratuitousness and horror. However, it did fit into a pattern of orders and strategies, quite characteristic of the 'general and systematic attack against civilian populations' that has become the litmus test for crimes against humanity. The head of the division, General Lammerding, had been ordered to assist Wehrmacht units in the south-west to 'rid the region of its communist bands and lastingly impress the populations by acting with no restraint whatsoever'. The massacre was committed against the background of the Sperrle order, which instructed occupation troops on how to deal ruthlessly with 'terrorist' action. The Waffen SS had honed their murderous skills on the Eastern Front, and their modus operandi in Oradour reflected a pattern long evident in Ukraine or the Balkans that was being transposed on the Western Front as resistance networks sprung into action after D-Day. In the days preceding the events, the Germans had become increasingly impatient with attacks on troops and particularly the kidnapping by the French resistance of a German officer. This was in the overall context of the Allied landing in Normandy and probably a realization among the Germans that the tide was turning. The goal may have been to terrorize the population into submission, especially after an uprising in neighbouring Tulle (the city had briefly, but precariously, been retaken from the Wehrmacht and was brutally punished), and to limit guerrilla action against German columns. Evidence presented at trial of exchanges between SS officials in the hours that preceded the massacre suggested a punitive expedition was in the making. Yet even that explanation fails to be entirely convincing: if reprisals or a warning had been intended, why was so much effort put into hiding the crime rather than publicizing it as an example?

Why Oradour was chosen despite its lack of apparent link to the maquis also remains unclear. It was at one point argued that it may have been confused with Oradour-sur-Vayres, a neighboring village which was a significant centre for resistance, although that thesis now tends to be discredited. In fact, rather than being targeted because it was a maquis-supporting village, it may well have been chosen precisely because the Germans knew it had no maquis, and would therefore prove a particularly defenceless target. If nothing else, it was relatively small (for example, compared to neighbouring Saint Junien, a town of 10,000) and thus made for a feasible, well planned one-day murderous expedition. Another possible motivation was that Oradour, as a relatively well-off village that had remained somewhat apart from the war, was a prime plunder target.

These doubts about the precise motivation for the operation ultimately made it hard to characterize it criminologically. Was it first and foremost a manifestation of an excess of violence in war but nonetheless, even in a distorted way, part of the

pursuit of war in that it responded to specific military incidents? Did it exemplify the dangers of anti-insurgency warfare in a context where partisans had a tendency to blend with the local population? Or was it more gratuitously sadistic and exterminatory—more reminiscent, except for its lack of discriminatory or racist character, of the Einsatzgruppen's reign of terror behind Eastern lines?

Whilst there is no entirely satisfactory answer to these questions, victims provide an interesting prism through which to address them. Victims were characteristically ambivalent about the testimony presented in court. In part, they did not want Oradour to be simply presented as an act of folly, one entirely irreducible to human rationality, because of the risk that folly might somehow excuse what happened, and make the events less representative of German barbarity. In addition, folly was not particularly credible given the number of individuals involved and the meticulous organization of the massacre. It was important to victims' perception of that day's evil that it had been premeditated.

However, nor did victims want the massacre to be attributed to even a distorted military rationality. In fact, victims were wary of attempts to 'explain' the massacre too much, in particular by those who would have drawn a link with maquis activity, something that might have made it look more like an operation of reprisal than an act of unprovoked barbarity. It was important in the public debate to make the killing appear entirely unnecessary from a military point of view, even if that led to some very twisted logic,[5] if only because the massacre must have had some marginal chilling effect on the resistance (or could somewhat rationally be thought of in that way by Nazi tacticians). In the end, Oradour had to be sufficiently planned that it could not be dismissed as a psychopathic aberration, yet not so rational that it might find apologists. This line between reason and folly was arguably one of the finest navigated by the trial.

(IV) Collectivization and Moral Hierarchy

Although the focus of a trial such as the one in Bordeaux was to establish the guilt or innocence of select individuals, and although survivors and relatives of victims insisted that this was all there should be to it, it proved extremely hard to abstract these individual issues from the complex ways in which they related to group responsibility. The argument in Alsace was very much framed as one of that region's own grievances emerging from the war. Alsatian public opinion, of course, condemned the massacre. The accused even had Pierre Zackenberg as their lead lawyer, an Alsatian résistant who had been held by the Germans from 1942 to the end of the war, and who could hardly be suspected of sympathy with collaboration. Moreover,

[5] For example, one of the most bizarre (and unconvincing) arguments heard in this context was that Dresden and Hiroshima were not criminal because their very magnitude showed them to have been necessary to the belligerents' war effort, whereas localized, 'incomplete' massacres such as Oradour betrayed something more sinister. See (disagreeing) Jean Pierre Maunoir, 'Le Procès d'Oradour', *Revue de droit international, de sciences diplomatiques et politiques* (1953), 186.

by a bizarre twist of fate, a number of Alsatians (nine, including two children, to which should be added fourteen children from neighbouring Lorraine) were among the victims at Oradour, having been evacuated there by the French authorities prior to the outbreak of hostilities in 1939.

This did not prevent Alsatian public opinion from seeing considerable injustice in the particular case that was unfolding in Bordeaux. The Alsatians thought that they had equally been victims of the Germans and that the trial essentially prosecuted victims. They could point to the fact that the German Gauleiter in Alsace, Robert Wagner, had been convicted and executed for war crimes, partly on the basis of the forced recruitment of 130,000 Alsatian men. Of those, 30,000 had died, 20,000 had disappeared, 10,000 were gravely wounded, and many of the rest were traumatized forever by what they had seen and done on the Eastern Front. No Alsatian family was immune from the consequences of forced enrolment (one defence lawyer did not hesitate to compare the 600 victims of Oradour to the 40,000 victims in Alsace). In fact, and by another curious twist of history, Karl Buck, the sadistic SS-Hauptsturmführer and head of the Schirmeck camp, was being tried in Metz simultaneously, further inflaming Alsace's sense of victimhood.

There was also a feeling that Alsace was doubly victimized by France, having been largely abandoned to its Germanization by the Vichy Government, and then being made to pay for some of the tragic events that followed. The Alsatians went as far as to suggest that they were equally victims of Oradour-sur-Glane, something which provoked considerable indignation in the Limousin, where forced recruitment was seen as incommensurable with the wanton killing of the innocent. Nonetheless, there was a deep-seated feeling of being ill-understood by the rest of France, and of resentment for French society and the state for overlooking the tragic circumstances of forced enrolment. For many in Alsace, the co-presence of *malgré nous* (literally 'despite ourselves'—this is how the French describe those forcibly conscripted into the German army) and German SS in the docket in Bordeaux was tantamount to prosecuting tormentor and victim simultaneously.

Foremost in the minds of many Alsatians was also a specific matter of what one might call judicial aesthetics. It had proved very difficult to find or arrest the German officers suspected of being most responsible for the massacre. It was not immediately known after the war that the commander of the Das Reich division, General Lammerding, was living in Düsseldorf, in the British-occupied zone. After 1948, the official British policy was to only extradite Germans accused of homicide. At any rate, the French seemed to have failed to make a formal extradition request. It has been argued since that Lammerding received CIA protection in exchange for intelligence. At any rate Lammerding subsequently thrived as an entrepreneur in Germany, his name adorning the trucks of his construction company. Similarly, there were some doubts about how persistently French authorities had pursued the extradition of Captain Kahn, commander of the third company. Defence lawyers in Bordeaux claimed that he was hiding in Sweden, but that no demand for extradition had been made by the French government. By contrast, the surviving Alsatian members of the third company had been much easier to locate and the

irony was that, even though their case may have been more ambiguous, no issue of state cooperation or extradition arose in their case. This led to a widely shared perception in Alsace that the forcefully conscripted foot soldiers were being made to pay for the high ranking fugitive Nazi fanatics.

The net result was also that fourteen of the accused were from Alsace whilst only seven Germans were in the dock. This gave the appearance that two thirds of those involved in the crime were from Alsace. This ratio was largely accidental, and based on who had been identified, who had survived and who could be arrested (a total of fifty-two Germans had been indicted, and at least 150 had been involved). The actual ratio on the day of the massacre was closer to one Alsatian for every five or six Germans. Nonetheless the perception was very much that Alsatians were made to bear a disproportionate share of the blame, something which only reinforced the Alsatian sense of victimization. As in subsequent trials, it would prove very difficult to shift attention away from this symbolism simply by insisting that the trial was only about individual guilt.

(V) Joinder and Disjoinder

The perceived problem of having the *malgré nous* stand trial next to the German SS translated into successive challenges to the trial all of which sought to juridically differentiate the situation of the Alsatians from that of the Germans. At the outset, there had been hopes that the Alsatians would be tried entirely separately, and in a different court than the Germans. The French war crime legislation (an *ordonnance*) of 28 August 1944, which provided the framework for post-war prosecutions, only applied to foreign nationals, as a result of the fiction that war crimes could not be committed by French nationals in occupied France. The idea was that French collaborators should fall under a different jurisdiction for treasonous acts. In fact, one of the Alsatian accused (Grienenberger) claimed the protection of the *non bis in idem* principle arguing that he had already been prosecuted for treason in 1947.

At the same time, there was a strong preference for all the Oradour events to be prosecuted in a single trial. In today's parlance, one might say this made sense from the point of view of transitional justice. If nothing else, it made sense from the point of view of the prompt and diligent administration of justice. Whatever other political considerations may have come into play, it was extremely difficult to distinguish between 'French' and 'German' acts at Oradour, and certainly the victims had faced a group of men all equally donning the SS uniform and, as far as they were concerned, all equally murderous. Victims also strenuously argued against the attempt to equate the prosecution of *les douze* ('the twelve') with that of Alsace, insisting that only individual criminal liability was at stake. The Alsatians might even gain from being judged side-by-side with the much more evidently guilty German SS. Following a visit to Oradour by the French President Vincent Auriol in 1947 and with the full support of the then very powerful Communist Party, a new law was promised that would remedy the loophole. The law, adopted

on 5 September 1948, made the repression of war crimes applicable to the French as well, and made them susceptible to trial before a military court. The Cour de Cassation rejected Grienenberger's argument that he would be judged twice for the same acts, since the treason accusation and the Oradour accusations under the 1948 law were entirely irreducible.

Having failed to obtain a separate trial before ordinary French courts, the Alsatian counsel for the accused subsequently did everything they could to have their case disjoined from that of the Germans. Some went as far as to suggest that trying the Alsatians and Germans together amounted to fulfilling Hitler's annexionist project by showing them as intimately bound. The Cour de Cassation refused the disjoinder in August 1950, and sent both Germans and Alsatians to trial together. Several other attempts to obtain a disjoinder during the trial failed, despite having obtained the support of the prosecutor (apparently under pressure from Paris) and the neutrality of German counsel. Apart from the need to respect the 1948 law, whatever criticisms had been levelled at it, the fear expressed by the presiding judge was that disjoinder, albeit presented as a mere symbolic and procedural move, would require the court to decide on the issue of forced enrolment (if it had occurred, then the 1948 law might be inapplicable) and thus prejudge the substance of the verdict (to which one might respond that joinder also seemed to prejudge something).

Ultimately, however, the adoption of a 1953 law essentially reversing the 1948 law as far as the French accused were concerned (their personal participation had to be proved henceforth and could not be assumed, whereas the Germans remained under the less favourable regime of being presumed to have joined willingly and participated in the crimes of their units) made the case for separation stronger. At the trial, the fact that the German and Alsatian defendants sat on opposite sides had already reinforced the sense that quite different predicaments were at stake. Since the trial had already reached the pleading stage by the time the 1953 law was adopted, securing the presence of the Alsatians at the Germans' trial and vice-versa seemed less important than when opportunities to confront versions might be necessary. The presiding judge ultimately ordered a 'division' of the trial rather than a full 'disjunction,' which would have required retrials.

(VI) Organizational Guilt and the Reversal of the Presumption of Innocence

The 1944 and particularly the 1948 law on which the trial was based was a highly contentious piece of legislation. It seemed ideally suited to the circumstances of Oradour and anticipated difficulties about establishing individual guilt given the dearth of testimony about individual acts. Its key Article proclaimed that when the war crimes enumerated in the earlier 1944 law 'can be attributed to the collective action of a group or military formation that belongs to an organization declared criminal by the international military court (which included the Waffen

SS)...then all individuals belonging to this formation or this group may be considered coauthors'.[6]

In addition, according to Article 2 of the law:

> For the purposes of applying the previous article, acts are considered imputable to the collective action of the relevant formation or group, war crimes committed by its members in the same region, even in isolation or out of their own initiative when, because of their importance, their gravity, their repetition, or the number of victims, these acts constitute the elements of a collective action.[7]

This was 'joint criminal enterprise' (JCE)[8] *avant la lettre*, mixed in with organizational guilt, a particularly tenuous and opportunistic construct from the point of view of fundamental principles of criminal law, which would certainly appear shocking by today's even imperfectly liberal standards. The law, often designated as the 'Law of Collective Responsibility', made little attempt to appear less extreme. In truth, however, it merely generalized to Frenchmen a series of presumptions introduced as early as 1944 for the prosecution of German war criminals. As long as only Germans were involved, the French legal world had lived quite well with the presumptions, which conformed to a sense of German willing participation in both the war effort and some of the crimes that ensued. The presumptions were destined to appear more unfair when the *malgré nous* were involved and part of French public opinion became much more painfully aware of how exorbitant such a provision was.

At the time the law provoked outraged reactions and was denigrated in the Alsatian press. Within the legal field, none other than Henri Donnedieu de Vabres, the French Prosecutor at Nuremberg, argued both in specialized law journals and in the press that the law had misunderstood the intentions of the Nuremberg and Tokyo tribunals when criminalizing organizations, which had never been to ignore the principle of individual guilt and the presumption of innocence.[9] Several doctrinal articles at the time underlined the fragility of the law from a human rights point of view, the feeling being that the law was at any rate largely superfluous given that French law allowed for the possibility of convicting individuals for a crime they had committed in *reunion* as part of a group with a common intention, even when the precise circumstances of their participation could not be elucidated.[10]

[6] Loi No. 48-1416 of 15 September 1948 on war crimes (my translation).

[7] Loi No. 48-1416 of 15 September 1948, above n 6.

[8] A.M. Danner and J.S. Martinez, 'Guilty Associations: Joint criminal enterprise, command responsibility, and the development of international criminal law', *California Law Review*, *93* (2005), 75.

[9] The judgment did make membership in certain 'criminal' organizations a crime, but only so long as membership had been voluntary and the individuals had known that the crimes were committed. The 1948 law essentially reversed the burden by considering that members of such organizations were to be presumed to have joined willingly and to have known the crimes committed. Although the language of the Nuremberg judgment remained superficially, in effect the 1948 law was much harsher: Henri Donnedieu de Vabres, 'Note, Cour de cassation, 3 août 1950', *Recueil Dalloz*, *40* (1950), 706.

[10] Maurice Patin, 'La France et le jugement des crimes de guerre', *Revue de science criminelle et de droit comparé* (1951), 393.

The biggest problem was the way in which the law seemed to depart from cardinal principles of French criminal law concerning individual guilt, among which were some of the very principles that the Vichy regime had strikingly departed from, and whose pre-eminence had been re-established by the Libération. The notion of collective guilt was also said to contravene the Universal Declaration of Human Rights, the recently adopted European Convention on Human Rights, and the principle of individual responsibility. Moreover, the law shifted the burden of proof onto the accused rather than the prosecution. To make matters worse, it was retroactive, in violation of French criminal law principles (and in ways that were perhaps reminiscent of the Vichy regime's own infamous legislation). Its adoption certainly did not help legitimize the trial in Alsatian public opinion. Because of the way it threw a broad mantle of opprobrium on a large class of individuals, it seemed to echo France's broad stigmatization of Alsace for the crimes.

Nonetheless, the law was found to be compatible with France's international obligations by the Cour de Cassation in 1950, upon challenge to the order sending the defendants to trial before the Bordeaux military court. It was said to merely implement what had been the London Charter (Articles 9 and 10) and the Nuremberg Judgment's recognition that certain organizations were per se criminal. The international tribunal, in accordance with its mandate, had not shied from recognizing that participation in several Nazi organizations was per se criminal, even though that was not necessary for the conviction of any particular defendant. In transferring into French law not only the provisions relating to the guilt of organizations, but also the essence of the safeguards for non-criminal individual members, the French legislator had conformed to its international obligations.[11] At any rate, no source of general international law mandated that domestic prosecutions be carried out in any particular way, and considerable latitude was granted to states who exercised their sovereignty in such matters.[12] It may have mattered also that the Nuremberg judgment was, strictly speaking, only concerned with a 'participation in a criminal organization' offence, whereas the French law dealt with the repression of war crimes[13] (although if anything one might think this made matters worse).

It is true that the law did ultimately provide a way to prove their innocence for individuals who could establish that they had been forcefully enrolled and did not participate in the crime, and not merely for those who could prove they had 'opposed' the crimes as had initially been suggested in Parliament, which would have placed a very heavy burden on the defendants. In other words, aside from the

[11] At any rate it was not for judges to 'appreciate . . . the value of a text that has been regularly debated by legislative assemblies and promulgated by the executive'. This points to the lack of constitutional judicial review available to ordinary courts in France, let alone the possibility of reviewing a law's compatibility with international human rights law.

[12] Donnedieu de Vabres nonetheless argued, probably rightly, that it was not open to the French legislator to invoke the authority of the Nuremberg Judgment, and then to reinterpret one of its key concepts (the criminality of certain organizations) in a way that was at odds with the tribunal's own interpretation: de Vabres, above n 9, 706.

[13] Patin, above n 10, 400.

issue of burden of proof, at least merely belonging to a group involved in crimes was not sufficient for a conviction, provided one could prove the absence of an *actus reus* (but how was one to prove conclusively that one had been forcefully enrolled and not participated in the crimes one was accused of?). The presumption of criminality was refutable. In addition, even within the framework of the 1948 law's notion of collective responsibility, the Cour de Cassation made it clear that the actual criminal acts of each participant had to appear in the indictment (if nothing else, this would prove crucial for sentencing).[14] The Cour de Cassation also picked up the fact in 1950 that some of the defendants had been given insufficient time and means to collect evidence to rebut the 1948 law's presumptions and ordered a remedy.

Moreover, the law did not *oblige* the judge to consider the impugned acts collectively and was not exclusive of ordinary French law on criminal participation, something which turned out to be crucial in due course. Throughout the trial, the presiding judge, Nussy Saint-Saëns, seemed wisely committed to not using the 1948 law to make his case. By the time the law was abrogated (see below), there was little choice for the prosecution but to try to prove some form of ordinary criminal participation rather than rely on the presumptions of collective responsibility. Nonetheless, even the 1948 law's *refutable* and *optional* presumptions of guilt did more to discredit the prosecutions in light of part of French public opinion and legal intelligentsia than any other provision.[15]

(VII) Orders, Forced Enlistment, Duress

Given the broad arsenal of presumptions available to the prosecution, the debate quickly shifted to defences, in a way that was to resurrect some of the burning issues at the heart of the national debate. Only one of the accused acknowledged his participation in the massacre. Many of the others confessed to having been at Oradour, but all claimed, to the presiding judge's disbelief, that they had taken no active part in the killing, and in some cases not even heard gunshots or explosions. Rather, everyone had been standing guard outside the village or taken away sick. Blame was placed by the *malgré nous* on Sergent Boos, the widely despised Alsatian SS volunteer, and, of course, on the Germans themselves. Yet even as they sought to minimize their own participation, legal defences were hinted at on several potentially exculpatory overlapping levels.

At the most extreme, the argument could be made that the defendants were only following orders. This was an argument most clearly made by the German defendants. It was clear that the Company enforced harsh discipline and some of the defendants, even among the Germans, could show that they had been on its

[14] de Vabres, above n 9.

[15] Donnedieu de Vabres, in particular, was sceptical that it made any difference that the presumptions were optional. Their very existence as tools of the judiciary offended the legal canon, went against the idea of the judicial discretion ('intime conviction'), and there was no guarantee that they would not be used: Donnedieu de Vabres, above n 9, 706.

receiving end. Some of the testimony heard on the defence side insisted on the habits of blind obedience and practices close to brainwashing that the Hitler youth inculcated to young recruits prior to their enrolment. A bizarre incident also threw an unwelcome light on the events: a letter sent by SS General Lammerding from his German retreat in which he argued that the Germans should be freed since they had merely respected orders. Even the French prosecutor seemed to recognize that an army could not function merely on the basis of some loose subordination, and that discipline and obedience were the cornerstones of military life. The defence insisted that soldiers could not be philosophers and could not inquire into the justness of acts they were ordered to commit. Moreover, there was some evidence that at least the subordinates may have been led to believe that the civilians were in fact *résistants* or *Résistance* sympathizers[16] and that any action undertaken in Oradour was already covered by general orders. At any rate, by the time they might have had an awakening of conscience, there would have been very little time to decide to disobey, and even less to survive in doing so, so that disobedience was by any standard unrealistic.

In spite of all this, the defence was bound to fail given the very strong Nuremberg precedent and the idea that superior orders can never be a defence. The Lammerding letter was wisely never produced in court by counsel for the German defendants, and would probably have done little in terms of minimizing their guilt. The French prosecutor insisted that due obedience did not extend to acts that were manifestly illegal, such as the killing of women and children. The killings of Oradour went far beyond any presumption of legality. Nothing had been found during the pro forma searches carried out by the SS in the village (which probably had more to do with looting than seriously looking for weapon caches) that could have suggested to those present that they were involved in anything other than a wanton massacre, and those who had any doubts should have shed them by the time it was clear that hundreds of women and children were targeted.

Something more than merely following orders was therefore necessary, and much was made of the fact that twelve of the Alsatians, like 130,000 of their peers, had been forcibly enlisted. This involved a problematic conflation of the issue of the personal responsibility of the defendants and the collective fate of Alsace as a region, which counsel for the defence actively promoted. Compulsory military service had been introduced in 1942. There was a lingering suspicion in France that Alsatian SS members were not entirely hostile to the goals of Nazism (something which German propaganda certainly encouraged by presenting Alsatians as SS *volunteers*), reinforced by the fact that a small minority had clearly volunteered including, notably, Sergeant Boos, a defendant at the trial.

In reality, however, most of the Alsatian defendants and the Alsatian recruits in the SS were hardly fanatical Nazis. Some had served with the French army in 1939–40. Many went to extremes to avoid compulsory labour or service in the German military or SS (self-mutilation was not unheard of). Several had accomplished minor acts of

[16] The *Résistance* is the generic name given by the French already at the time to all efforts at overthrowing German rule and ending occupation. It included efforts within France and outside it.

resistance before and after being enlisted (smashing a window featuring a picture of Hitler, for example, or warning people about to be arrested), and some may even have been forced into the SS precisely because of their 'Frenchness'. In fact, forced enrolment was organized in Alsace largely because of the disappointing number of Alsatians volunteering for the SS (at most 2,000). Francophile sentiment ran strong in the region. The *malgré nous* were treated harshly by their German superiors and Alsatian volunteers because of their supposed lack of genuine Nazi sympathies and a suspicion that they were always on the verge of deserting (hence the apparent instruction that they never be left alone). Indeed the German General Staff had objected to including Alsatians in the Wermacht on account of their unreliability. Their weapons were apparently often checked after military action to verify that they had been used. Once captured in Normandy, one of the accused had subsequently participated with the Free French in the invasion of Germany and, for the trial, two had to be repatriated from Indochina where they were fighting for France.

The argument was that the initial element of compulsion made the subsequent following of orders a defence since constraint (other than general and habitual respect for the law) was involved at the outset. Indeed, the 1948 Law of Collective Responsibility anticipated as one possible defence that the accused 'bring proof of having been forcibly drafted'. This was all the more so since forced enrolment was itself a war crime. Hence the *malgré nous* could be regarded as themselves victims of a crime, a situation that evokes the status today of child soldiers accused of war crimes. It is worth highlighting the nature of that constraint. In annexed Alsace-Lorraine, the young were forced to join the Hitler youth, to attend the Reich school of Germanization, to enrol into the army, and were drilled Prussian-style. New recruits were given German nationality. Furthermore, the re-education camp in Schirmeck was available to deal with recalcitrants and torture them into submission. Crucially, Wagner also implemented the system of Sippenhaft, ie reprisals against the family based on the idea of 'blood' or 'clan' responsibility. Many of the defendants knew of men in Alsace whose entire family had been deported after they refused to serve in the SS. This led to a culture of blind obedience.

Of the fourteen Alsatians tried in 1953, twelve had been forcefully enrolled at the age of seventeen or eighteen, so that some today would count as child soldiers. In fact, the Alsatian who had been condemned to the death penalty in 1946 for his participation in at least one murder at Oradour was eventually acquitted on the basis that he was not eighteen at the time. Because the 1948 law did not, unlike ordinary French law, anticipate a specific regime for minors, they were tried with those who were adults at the time before the Bordeaux military court. Nonetheless their youth and immaturity were frequently mentioned as factors that would have made them extremely vulnerable to pressure and intimidation. Witnesses testified in Bordeaux about how difficult it would have been for anyone to oppose orders or desert the SS. It was repeatedly argued that one could not expect teenagers to be heroes and to sacrifice their lives rather than follow an order to kill. Moreover, given the contempt in which SS (especially French SS) were held in the region, it would likely have been difficult for them to surrender safely to the maquis (the *malgré nous* who deserted on the Eastern Front invariably ended up in gulags

where they were treated harshly). This vision of particularly harsh conditions being brought to bear on young shoulders was given renewed credibility by the fact that several of the witnesses testifying in the accuseds' favour were *résistants* in good standing, especially Alsatian *résistants*, who knew very well the risks they or others had taken to escape German enrolment.

Yet one of the characteristics of these Alsatian testimonies was that few seemed to have anything to do directly with the actual facts of Oradour, and were instead awkwardly about a much more general problem occurring far removed from the scene of the crime. Moreover, the circles of the French resistance were wary of the suggestion that 'collaboration' was acceptable as long as it had been coerced, and that forced enrolment might provide a blanket defence. After all, one might be initially coerced to join an organization yet later, through peer pressure or group bonding, become one of its enthusiastic executioners. At the very least one ought to be able to prove continuing pressure beyond the initial pressure of forced enrolment.

As many as 40,000 Alsatians had managed to escape compulsory military service by fleeing to France or Switzerland. Alphonse Adam, the head of the Alsatian student resistance, was executed as a result of his refusal to join the SS. The veterans' association of Lorraine, the region neighbouring Alsace, insisted that desertion had always been an option, perhaps to better distinguish themselves from the Alsatian *malgré nous*. One might argue that this was particularly so in the case of the third company which, contrary to normal SS practice, had had the 'chance' of being deployed in their own country, a terrain which would presumably have been more hospitable for them than, say, Soviet Russia. The South West Federation of the *Forces Françaises Combatantes* emphasized, rightly or not, that there were plenty of local maquis to which the SS could have deserted. Indeed, at least one Das Reich member had escaped to the maquis after Oradour and had subsequently died fighting for France's liberation. It seemed impossible to entirely exclude the possibility of moral choice, and the fact that it could be rational or simply brave rather than implausibly heroic.

Pointedly, the Alsatians were asked why if, as they professed, they hated being in the SS, they had failed to desert; or, even more problematically, why they stayed when their work consisted only in persecuting civilians, but in some cases fled when faced with the harsh reality of combat in Normandy. The line between constraint and *libre arbitre* was also a tenuous one. After all, it may well have been, as their lawyer suggested and as the German press insisted much later on when the Alsatians were amnestied, that not even the German indictees had joined the SS freely. This argument in defence of the Germans tended to weaken the same argument being made in favour of the Alsatians, for the obvious reason that it was not something that French and international post-war public opinion was willing to contemplate (it would have unravelled the one thing on which all agreed: Nazi monstrosity). Moreover, the gap between forced enrolment months or years earlier and the commission of atrocities one June day in 1944 simply seemed too large to sustain a convincing defence that the crimes were entirely unintentional. Staying and complying with orders to participate amounted to endorsing the massacre. At best, the prosecutor argued, forced enrolment should

be an extenuating circumstance relevant for sentencing, not one that would exclude guilt.

Alternatively, the argument was made that the defendants were not only (or really) following orders, as much as responding to a threat of death if they refused to execute them. The defence of superior orders, in that case, really becomes a defence of duress, which could nullify intent even more effectively than forced enrolment. It was a defence that was and continues to be anticipated by Article 64 of the French Criminal Code. There was certainly evidence that refusal to obey an order during operations might lead to a court martial and an execution, possibly immediately. However, again the issue of desertion 'at the earliest possible moment' arose. It was viewed as inherently risky but certainly not more so than remaining with a unit destined for the Eastern Front or Normandy. Moreover, there was damning evidence during the trial of the third company having gone quite happily to the massacre (including hints of an orgy of drinking and, possibly, rape in the night that followed), and having executed it with a cruelty against specific victims that belied any notion of duress. Although this evidence was not related to any specific defendants, it did nothing to improve their individual cases.

(VIII) Sentencing

In terms of sentencing, it appears that lack of direct participation in some of the worst killings (firing squads, church massacre, individualized killing), young age, forthrightness with the tribunal, remorse and contrition were all considered mitigating factors resulting in simple prison sentences, which in some cases amounted to very little, given time already served. Conversely, rank (particularly the German and the Alsatian non-commissioned officers), direct participation in killings and unrepentance led straight to death sentences or forced labour convictions. Overall the sentences of the Alsatians were marginally less harsh than those of the Germans for comparable facts, and were adopted by a majority of judges rather than unanimously, a nod at least in the direction that their situation was not quite comparable (although of course not enough of a nod from the Alsatian point of view).

In that respect, it seems that the tribunal judged German failure to stand up to their superiors and disobey orders more harshly than it did the *malgré nous.* The suggestion may have been that Alsatian presence among SS ranks was based on pure coercion making a gesture of defiance highly implausible; whereas it may be that the Germans were seen as having more of a special responsibility given that they were operating among their own. Yet even this distinction (which was not explicated and is merely proposed hypothetically here) is peculiar in its generality. Surely some Germans might be able to argue that their being in the SS was largely based on a similar type of coercion, a point raised by some in the Bundestag at the time.[17] Moreover, if one was serious about one's war crimes justice cosmopolitanism, should it really have made

[17] Norbert Frei, *Adenauer's Germany and the Nazi Past: The Politics of Amnesty and Integration* (New York, NY: Columbia University Press, 2002), 139.

much of a difference, sheer duress being equal, that one was a national or not of the country behind the crimes? The Alsatians' fate may have been a cruel one, but if anything their claim to having been radically victimized by the Nazis might have been stronger had at least some risen up in Oradour at the point of being asked to commit the most Nazi-like of acts.

A peculiar twist nonetheless made the sentences of the *malgré nous* much harder to stomach: the Germans had all been detained since the end of the war and were therefore close to liberation when time already served in pre-trial detention was discounted (the majority were in fact freed soon after the verdict). Conversely, the Alsatians, who had all appeared as free men and had gone on with their lives since the end of the war, faced the beginning of lengthy sentences. Predictably, the sentences left all French sides profoundly unhappy. Alsace was convinced that the Court had largely failed to hear its arguments, and that a few of its sons were scapegoated and further victimized. Limousin public opinion found the sentences completely inadequate, the expectation being that only the death penalty could have made sense of the horror of the crimes committed. The misunderstanding was complete and created considerable political strains.

(IX) Politics and Amnesty

The Bordeaux trial presents a unique case in which debates in Court were paralleled before the French Parliament in almost real time, in ways that challenged the separation of power between the legislature and the judiciary. The Law of Collective Responsibility had itself been adopted with the Oradour massacre in mind, a law almost tailor-made for the Bordeaux trial and the claims of victims. Once the trial had begun, however, the powerful Alsace *incorporés de force* organizations, relayed by local elected officials and Alsatian members of Parliament, successfully lobbied for the Law of Collective Responsibility to be debated anew. There were in other words two parallel tracks, one judicial and one parliamentary, dealing with the exact same questions. Debates were launched in Parliament following court decisions, as though the legislature sought to intervene in judicial proceedings. Whereas arguments on Alsatian martyrdom could only be secondary in the courtroom, they received a full airing in Parliament. The Alsatian members of parliament proposed an amendment to the 1948 law. The Communists, who emerged from the war and occupation as some of the most reliable *résistants*, were almost alone in opposing any changes.

Geographically, the fact that the trial occurred in Bordeaux, within a bus ride of Oradour, meant that considerable local pressure came to bear, sometimes in the form of protests outside the courtroom. The judge made it known via the press present in the courtroom that he disapproved of such demonstrations, and thought that they did not help the victims. However, the general context was one of popular and political pressure on both sides. The trial was also intensely covered by the media in a way that was relatively new at the time.

Ultimately, the pressure of the Alsatian members of Parliament carried the day and the Law of Collective Responsibility was abrogated, in the midst of the trial, by 372 votes to 279. This gave rise to the curious and quite unique situation where a trial was deprived, in mid-course, of the very instrument on which it had partly been based. The trial continued because the law still needed to go through various stages to become formally binding and because ordinary French criminal law remained an option to convict the accused. However, there is little doubt that the trial's vitality had already been fatally compromized, and that future developments were already contained in this turning of Parliament against its own creature.

The result of the vote only reinvigorated Alsatian efforts to bring the trial to a halt. Général de Gaulle weighed in favour of more understanding for Alsace. A mere ten days after the verdict, an amnesty was adopted in the Assembly by 319 votes for, 211 against and fifty-five abstentions, the only of its kind in the history of the French legal system. It was a considerable victory for Alsace, which in the space of a year had managed to obtain the vote of two laws nullifying the Bordeaux trial. It is best understood as a pacifying measure designed to further a form of regional reconciliation in France. Politically, such had been the Alsatian reaction to the initial verdict that some feared that it would reinforce the region's autonomist aspirations—and some promoters of the amnesty subtly raised that prospect. National reconciliation was hailed as the overriding goal by the centre right. This was not the only initiative that seemed to have reconciliation as a superior goal: the lack of diligence with which French authorities pursued the extradition of the German officers at large could also be attributed to the onset of the Cold War and a desire to move closer to Germany.

The amnesty was criticised by victims who were left with an extremely bitter taste in their mouths and the impression of having been betrayed. It also represented an unprecedented meddling by the legislature with a court decision. It was feared, although this probably proved unfounded, that the amnesty law had handed former collaborators a new defence of having been coerced into collaboration. The fact that the two defendants who had been sentenced to death (the Alsatian volunteer and the German Sergeant) were pardoned did nothing to restore faith in the justice system. By 1958, all were free men.

(X) Legacy and Epilogue

Perhaps one of the most interesting aspects of the Bordeaux trial was the reverberations it created in France, and the way every judicial stage had a tendency to spill beyond the courtroom. Following the initial condemnation of the *malgré nous*, for example, Alsace reacted strongly. In Strasbourg, a 6,000-strong demonstration was organized, replicated by several smaller events elsewhere in Alsace; the *Place de Bordeaux* was renamed; the *Monument aux Morts* was draped in black. Local elected officials claimed they would cease to sit and carry out their functions until Alsace's honour had been restored.

Yet the reaction of Oradour to the amnesty was in some ways even more drastic. In 1945, Général de Gaulle had visited the village and decided it should have a special place in French national memory. The old village was to be preserved and granted a special status in French law, whilst a new Oradour would be built next to it. The Oradour authorities clearly supported the project and conceived of themselves as guardians of its legacy. Following the Bordeaux verdict, however, the village engaged in a decades-long symbolic retaliatory action against the French state: it sought the return of the commemorative site from the government; the association of survivors and the village sent back the medals that they had received; state officials were denied access to commemorations (no French President was received there until François Mitterand); the village refused to transfer the ashes of the martyrs to the crypt built by the state for that purpose. Perhaps most strikingly, a list of all the members of Parliament who had voted for the amnesty was displayed prominently at the entrance of the village for several years below the phrase *Oradour, souviens toi!* (Oradour, remember!). Thus did the village drape itself in its pride and for several years manifest its extreme repulsion at the outcome of the trial through various retaliatory measures.

These reactions are no doubt part of the fabric of transitional justice, even though they are not formally juridical. Only a legally pluralist sensitivity to how non-legal gestures inform the normative outcomes of transitional justice processes can make sense of what is at stake. Although there has been some subsequent reconciliation with the French state, the issue is still a tense one, as shown by a succession of incidents in the last decades.

More than fifty years later, criminal justice finally caught up with Heinz Barth, the sole surviving Nazi officer implicated in the massacre, who had been found in East Berlin in 1983 under an assumed name. It seems that the German Democratic Republic (GDR) at the time saw that a prosecution might buttress its anti-Nazi credentials against those of the German Federal Republic. On trial, Barth admitted that he had initiated the shooting and personally killed about fifteen people. But he argued that as an officer he was forced to follow orders. He was sentenced to life imprisonment but was freed fourteen years later on medical grounds. He would go on to live another ten years.

In 2003, a French man, Vincent Reynouard was condemned by the Tribunal Correctionnel de Limoges to one year imprisonment for 'apology of war crimes' (denialism) following the publication of a book that challenged key aspects of the Oradour-sur-Glane massacre, including the fact that it had been planned.

Since 2004, a former Bordeaux defence lawyer has sought a revision of the judgment on the basis that the amnesty law, whilst it expunged the crime, did not render null and void the legal findings. The reasoning is that if the French Parliament could amnesty those convicted one week after the trial, then the judiciary should also follow suit, its own decisions having been cast into doubt by the legislature.

In 2004, a Corrèze organization unsuccessfully opposed the Senate's 2008 Draft Law Implementing the Rome Statute on the grounds that it anticipates a thirty-year limitation period, which would amount to a second amnesty for those responsible for the massacre.

In 2010, two Alsatian *malgré nous* organizations sued Hébras, one of only two surviving victims of Oradour, for claiming in a book he had published on the massacre that among the massacre's executioners were 'some Alsatians *supposedly* forcibly enrolled in SS units'. The Strasbourg Tribunal de Grande Instance rejected the claim. Subsequently Hébras received anonymous hate mail claiming that he 'did not deserve his identity card, whereas the Alsatians fought and paid dearly with their blood to become French again'.

Then on 5 December 2011, the German police, at the request of the German Federal War Crimes Office, carried out searches in the houses of six elderly Germans who had been identified as having participated in the massacre following the release of GDR political police documents. The searches do not seem to have yielded any leads further linking these individuals to Oradour, and the last two surviving victims have tended to dismiss such late German activism as coming far too late for justice.

These distant legal judicial and political ripples, whilst minor, testify to the difficulty of ever 'moving out of' or 'beyond' transitional justice, and the very long legal trail of frustration, pain and antagonism that a blundered judicial process can produce.

(VI) Conclusion

The Bordeaux trial is a stark illustration of some of the well-known challenges of carrying out criminal trials for atrocities, even in a country otherwise dedicated to prosecuting those responsible, as post-war France surely was. It suggests the importance of unintended effects in even the most scripted and well-intentioned judicial proceedings. The trial meant to condemn Nazi barbarity, the one thing on which all seemed to agree; for that purpose it benefited from a tailor made law that was to have made justice if not swift at least severe. Instead it mostly ended up raising some difficult questions about France, Alsace, forced incorporation, duress, and justice between communities; all issues for which, to make matters worse, the Bordeaux tribunal turned out to be ill-equipped to address.

It was in the end almost impossible to bridge the gap between two narratives of what had happened: on the one hand a vision of irredeemable crime, made perhaps even worse by the fact that the Alsatians had been involved in killing fellow citizens; on the other hand, a vision of a tragedy which led young men to commit reprehensible acts, but as a result of a sophisticated machinery of persecution and violence that left them little choice and made them into emblems of a region's tragic experience of the war. The trial was so caught up in demands for recognition of collective suffering that it could not mediate without leaving at least one side unhappy. Perhaps the only thing that everyone agreed on was the evil of the Nazis, but even that did little to cement national consensus.

Ultimately, the Oradour victims were sacrificed for the sake of a hypothetical national unity and the need to move on with a reconciliation process that was simply decreed unilaterally from above. Parliament reasserted its democratic prerogatives but in a way that was so heavy handed and opportunistic that its actions seemed

destined to antagonize. The judiciary, after being given what seemed to be a free hand to try those responsible, was twice reined in: first by having the law on which the trial had been based pulled from under its feet; and then, when it nonetheless successfully managed to convict those responsible under ordinary French law, having its entire effort reduced to nothing through amnesty.

Here was the one trial that could not fail: abominable acts, a polity ripe for justice, a strong international framework—yet which foundered on the rock of radically incompatible narratives, and served only to open up further abysses of misunderstanding. Even radical evil, it seems, could have its reasons and, recast as merely the absence of heroism, it may have suddenly looked strangely familiar to a France that had itself been deeply compromised in collaboration—forced or not. As such, the whole effort is a familiar caution about the limits of criminal justice within transitional justice processes when it operates from uncertain common premises and is asked to precede rather than follow collective exercises of soul-searching. Thus stands the Bordeaux trial, a particularly French tragedy, yet one that contains a more general lesson on the disheartening powerlessness of humanity in the presence of moral disasters.

PART 3

EUROPEAN HISTORIES II: AMERICANS IN EUROPE

8

Capitalism's Victor's Justice? The Hidden Stories Behind the Prosecution of Industrialists Post-WWII

*Grietje Baars**

(I) Introduction

It is well known that in the 'subsequent trials' held in Nuremberg by the US military, the directors of three of Germany's largest industrial combines (and one bank) were prosecuted for their roles in the Nazis' aggressive wars and the Holocaust. What has remained largely hidden is how the rapidly changing geopolitical landscape influenced the decision to try industrialists for their war responsibility, the articulation of the 'economic case' at the International Military Tribunal (IMT), the conduct of the industrialists' trials at the US Military Tribunals at Nuremberg (NMT) and eventually the early release and rehabilitation of the convicted business leaders. The US and USSR had at one point both understood World War II (WWII) as a war of economic imperialism in which industrialists had played a key role—both in planning and waging. With the commencement of the Cold War this idea became a point of sharp ideological divide. The economic story of WWII gradually moved over to 'hidden history' in the West, while remaining visible only in the German Democratic Republic and Soviet discourse. Likewise, the omission of *zaibatsu* leaders from the Tokyo International Tribunal hid the Allies' expressed conviction that also the war on the Eastern front had been one of economic imperialism. Over time, the way international conflict is conceptualized and explained in mainstream Western (legal) discourse has changed, as has the role that international criminal law (ICL) is accorded in world politics, and whose

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accountability is sought through ICL. Together, these facts reflect capitalism's hidden victor's justice.

In contrast to mainstream liberal-legal and positivist accounts of 'Nuremberg',[1] in this chapter I tell the story—in particular the specific story of the 'economic case' and the industrialists—as situated in the material context and relations of the time. Doing so shows the direct effect of specific turns of events not only on the legal processes, but also on how ICL was interpreted and applied. Through a historical materialist reading of Nuremberg, we can explain, for example, how the NMT trials turned from an ostensible morality play to a performance of *théâtre de l'absurde*.

It is hoped that through highlighting the processes and contradictions at Nuremberg this chapter will give impetus to investigating precisely how *current* use of ICL also seeks to 'spirit away' economic causes of contemporary conflict and thus forms an integral element of capitalist imperialism.[2]

Section II begins with an examination of the Allied (effectively, US and USSR[3]) consensus on the nature of WWII as imperialist, on the role of the industrialists in Hitler's aggressive war, the formulation of the 'economic case' and the indictment, trial and judgment at the IMT. I tell this history focusing on the US perspective because the main international trial was very much a US-directed affair.[4] It served to simultaneously legitimize and showcase the US's role as the rising hegemon of the 'free world'. While the US leadership's desire to prosecute industrialists and discipline the German economy played an instrumental role in its decision to hold subsequent trials at Nuremberg,[5] the appetite for this declined with the turnaround in US foreign and economic policy that gradually materialized after WWII. Section III traces this turnaround—the start of the Cold War—and its impact on US political and economic involvement in Europe. In Section IV, I go on to show how this turnaround manifested itself in the conduct and outcomes of the trials

[1] See, eg, those contained in Guénaël Mettraux, *Perspectives on the Nuremberg Trial* (Oxford: Oxford University Press, 2008). Among the off-mainstream accounts are, Florian Jeßberger, 'Die I.G. Farben vor Gericht: Von den Ursprüngen eines "Wirtschaftsvölkerstrafrechts"', *Juristenzeitung*, *19* (2009), 924; Florian Jeßberger, 'On the Origins of Individual Criminal Responsibility Under International Law for Business Activity: IG Farben on Trial', *Journal of International Criminal Justice*, *8* (2010), 783; J. A. Bush, 'The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said', *Columbia Law Review*, *109* (2009).

[2] According to Arthur, the task of the legal academic 'is that of tracing . . . both the relationships that are expressed in the legal superstructure and those that it ideologically spirits away': C. Arthur, 'Introduction' in E. Pashukanis, *Law and Marxism: A General Theory* (London: Ink Links, Ltd, 1978), 31.

[3] I use 'US', 'USSR' etc as shorthand for the leading members of the government at any given moment—in other words, the momentary 'winners' of the constant competition between various sectors of a state administration (for a similar approach, see Nikolai Bukharin, *Imperialism and World Economy* (London: Bookmarks, 2003), 137).

[4] See, eg, Telford Taylor, *Anatomy of the Nuremberg Trials: A Personal Memoir* (New York, NY: Little, Brown & Company 1992), 634 and generally, F. Hirsch, 'The Soviets at Nuremberg: International Law, Propaganda and the Making of the Postwar Order', *American Historical Review*, *113* (2008), 730.

[5] Taylor, above n 4, 161; Bush, above n 1, 1112–29; Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford University Press, 2001), 24.

of the industrialists at Nuremberg. Section V compares the US trials to the largely forgotten post-WWII international trials of industrialists by the French, British and Soviet military tribunals, and with the decision of the Military Tribunal for the Far East not to indict Japanese *zaibatsu* leaders. Finally, Section VI connects the aftermath of the trials, the 'McCloy clemency' and subsequent reinstatement of most of the industrialists to their former positions, with contemporary debates around ICL, the economic causes of conflict and 'corporate impunity'.

(II) The Economic Causes of WWII at the International Military Tribunal at Nuremberg

The 'Trial of the Major War Criminals at Nuremberg' commenced at a moment when the role of the German industrial combines in Hitler's aggressive war was emphasised by US political leaders in public statements, declarations and reports. The US leadership considered the aggressive, expansive war to have been orchestrated by the 'unholy trinity' of corporatism, Nazism and militarism,[6] for the markets and resources of the neighbouring countries, and indeed, with the eventual aim of 'world conquest'.[7] The American administration had scrutinized the nature and activities of German industry in this respect since the beginning of the war. In his memoirs, Josiah Dubois (a State Department lawyer who was to become the lead prosecutor in the *IG Farben* case) tells of travelling the Western Hemisphere with Bernard Bernstein of the Treasury Department in the early 1940s to seek out and freeze IG Farben's financial interests.[8] The German industrial and banking giants had been discussed in depth in the US Senate, for instance in the Kilgore Committee, and formed a major site of investigation for the Office of Strategic Services (OSS), the forerunner of the Central Intelligence Agency.[9] German chemicals giant IG Farben appears to have been a main object of interest for the

[6] Telford Taylor in *Flick*, below n 51, 32. See also, Jackson's June 1945 Report—this report contained the 'basic features of the plan of prosecution' written at the request of the US President by the (then) US Representative and Chief Counsel for War Crimes: Justice Jackson's Report to the President on Atrocities and War Crimes; 7 June 1945, available from Yale Law School, *The Avalon Project: Documents in Law, History and Diplomacy* [website], <http://avalon.law.yale.edu/imt/imt_jack01.asp>, (Jackson June 1945 Report) (accessed 27 February 2013).

[7] This view is expressed, for example, in the US Congress, Senate, Committee on Military Affairs, Cartel Practices and National Security, Hearings Before a Subcommittee of the Senate Committee on Military Affairs, 78th Cong., 2nd Sess., 1944. Vol. 16; IG Farben Material Submitted by the War Department, 79th Cong. (1945) (Bernstein Farben Report), 941 and 953–57; Christopher Simpson (ed), *War Crimes of Dresdner and Deutsche Bank: Office of the Military Government (US) Reports* (Teaneck, NJ: Holmes & Meier Publishers, Inc., 2001) (original report produced November 1946).

[8] Josiah Dubois, *The Devil's Chemists: 24 Conspirators of the International Farben Cartel who Manufacture Wars* (Boston, MA: The Beacon Press, 1952), 14–15.

[9] See, eg, Office of the US Chief of Counsel for the Prosecution of Axis Criminality, Staff Evidence Analysis (Gen. Thomas), Fundaments for a History of the German War and Armament Economy (1944), *Cornell Donovan Archive,* Vol. II, 6.15; Office of Strategic Services, Research and Analysis Branch, German Military Government over Europe: Economic Controls in Occupied Europe, Washington 28 August 1945, *Cornell Donovan Archive*, Vol. CVIII.

Americans. The OSS investigated the concealment of ownership of IG Farben subsidiaries operating in Allied jurisdictions, the identity and role of the German bankers and financiers and the precise mechanisms of economic warfare employed by the Reich.[10] Intensive investigation into the global span of the IG Farben cartel led the US leadership to fear that German imperialism would not be confined to the European continent.[11] In 1945 the Congressional Subcommittee on War Mobilization, chaired by Senator Kilgore, heard evidence to the effect that one of Farben's key objectives was to drive the US out of the European market. It also learnt how IG Farben managed to exclude US companies from acquiring necessary resources on the Latin American market and so significantly curbed US war production and thus military potential.[12] Through US subsidiaries, IG Farben gathered important intelligence on US war production and through ingenious patenting and subcontracting arrangements it excluded American industry from important military technologies.[13] The US investigation found that, besides Standard Oil, dozens of US companies had agreements with IG Farben—and this was without counting Farben-owned subsidiaries.[14] Bernstein's Farben Report quotes Farben witnesses who profess to have been fully aware of, and in complete agreement with, Hitler's plans for aggressive war, with Farben director Von Schnitzler even going so far as to state 'IG Farben [was] completely responsible for Hitler's policy'.[15] As a household name, producing both Aspirin and Nylon stockings and present in every American home, Farben spoke to the imagination of the American public.[16] There can be little doubt that this played a role in the US government's later decision to prosecute the Farben directors.

Furthermore, the Finance Division of the Office of the Military Government of the US (OMGUS) (which had its headquarters in the former IG Farben complex in Frankfurt) produced a series of reports totalling over 10,000 pages detailing the investigations into German banks and other financial institutions.[17] Together, the sources paint a picture of highly sophisticated and effective economic warfare

[10] See, eg, US Group CC/Finance Division, 'Preliminary Report: Concealment of Ownership of Some I.G. Farben Selling Companies', *Cornell Donovan Archive*, Vol. VII, Section 13.18. The OSS investigation was led by Franz Leopold Neumann, a German intellectual and who had fled to New York in the 1930s with other Frankfurt School members Otto Kirchheimer and Herbert Marcuse. His 1944 book *Behemoth: The Structure and Practice of National Socialism* served as the blueprint for the US leadership's understanding of the Nazi 'apparatus' (Franz Leopold Neumann, *Behemoth: The Structure and Practice of National Socialism* (London: Octagon Books 1963)). Other US authors had also analysed—already during WWII—Germany's 'industrial offensive', see, eg, Joseph Borkin and Charles Welsh, *Germany's Master Plan: The Story of Industrial Offensive* (New York, NY: Duell, Sloan and Pearce 1944). Borkin was economic advisor to the Antitrust Division of the Department of Justice in Washington (T. Arnold, 'Introduction', in Borkin and Welsh (eds), *Germany's Master Plan*, xvi), and responsible for this office's investigation into IG Farben during WWII. See further Joseph Borkin, *The Crime and Punishment of IG Farben* (New York, NY: The Free Press, 1978).

[11] Donny Gluckstein, *A People's History of the Second World War: Resistance Versus Empire* (London: Pluto Press, 2012), 10.

[12] Bernstein Farben Report, above n 7, 947, 952; US Congress, Senate, Committee on Military Affairs, above n 7; 79th Cong. (1945), Part 10, IG Farben Exhibits (Kilgore Farben Exhibits).

[13] Bernstein Farben Report, above n 7, 945.

[14] Bernstein Farben Report, above n 7, 993.

[15] Bernstein Farben Report, above n 7, 957.

[16] Dubois, above n 8, 3.

[17] Simpson, above n 7, 1.

carried out by the German industrial leaders in collusion with military and Nazi leaders.[18] The Soviet leadership shared this understanding of imperialism; responsible for WWII was a band of ' "unconscionable adventurers and criminals"—comprising the Nazi party and military leaders as well as the directors of the larger banks and corporations'.[19] There was broad agreement on the imperialist nature of Germany's aggressive war and the role of the constellation Eisenhower was later to call 'the military-industrial complex'.[20] With WWII typified as a quarrel between Allied and Axis governments about who should dominate the world economy,[21] it appears Hitler's economic objectives troubled the US and USSR more than the Holocaust and the other atrocities carried out by the Nazis.[22]

In a number of places this US/USSR meeting of minds led to concrete articulation and action.[23] Among the sites where the Allies' understanding of the economic causes of the war were clearly articulated and responded to was the Potsdam Agreement.[24] This agreement, concluded on 2 August 1945 by the USSR, USA, and UK leaderships, de facto incorporated the 'Morgenthau Plan'—the plan for a pastoralized Germany drawn up by US Secretary of State Henry Morgenthau.[25] The Potsdam Agreement stipulated the destruction of Germany's future war potential through the 'decartellization': breaking up of the main German cartels through expropriation of physical property but also share ownership including ownership of foreign subsidiaries of German companies, demolition of factories and shipping off of heavy machinery to the Allies in the form of reparations in kind.[26] Significant parts of the Potsdam Agreement were carried out by the US and other

[18] Some authors follow an 'agency theory' approach to argue that Hitler was a mere puppet in the employ of German industrialists but the better view is one of control by the German elites from all three sectors, which, particularly after the 'nazification' of industrial leadership and according of military ranks to industrialists, became difficult to distinguish clearly and can be said to have formed a 'state-capitalist trust' (see, eg, Bukharin, above n 3, 127). For an overview of theories of 'war responsibility' between 'primacy of politics' and 'primacy of economics' see Norbert Frei and Tim Schanetzky (eds), *Unternehmen im Nationalsozialismus: Zur historisierung einer Forschungskonjunktur* (Göttingen: Wallstein Verlag, 2010).

[19] Jörg Osterloh, 'Die Monopole und ihre Herren: Marxistische Interpretationen', in Frei and Schanetzky, above n 18, 36 (my translation).

[20] Eisenhower farewell address (17 January 1961), Press release containing the text of the address, *Dwight D. Eisenhower: Presidential Library and Museum* [website], <http://www.eisenhower.archives.gov/research/online_documents/farewell_address.html> (accessed 26 February 2013).

[21] Indeed, 'the belief of ordinary people, that the issue was fascism versus anti-fascism, was largely irrelevant for rulers on both sides of the Axis/Allied divide': Gluckstein, above n 11, 9.

[22] Bloxham, above n 5, 57–90; Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: Oxford University Press, 2011), 4.

[23] See, eg, Section V of the Yalta (Crimea) Conference Agreement reached on 11 February 1945 between Stalin, Churchill and Roosevelt, published in *A Decade of American Foreign Policy: Basic Documents, 1941–49* (Washington, DC: Government Printing Office, 1950).

[24] Potsdam Agreement of 2 August 1945 between the USSR, the USA and the UK (Potsdam Agreement): Yale Law School, *The Avalon Project: Documents in Law, History and Diplomacy* [website], <http://avalon.law.yale.edu/20th_century/decade17.asp> (accessed 27 February 2013).

[25] Hans Morgenthau, *Germany is Our Problem* (New York, NY: Harper & Brothers, 1945).

[26] Potsdam Agreement, Part IIB (Article 12) and Part III.

Allied occupation authorities in Germany.[27] In the Eastern Soviet Occupation Zone most industries were nationalized.[28]

In the execution of the plan, 'Morgenthau Boys'—young German-speaking mainly Jewish men who had fled to the US during the war—were deployed to Germany by OMGUS to investigate the state of industry after the war, and to interview the key industrialists in each sector.[29] In the immediate post-war period hundreds of industrialists were interned by the Allies, with the British for example detaining 120 business leaders in the banking, chemical, electrical and automobile sectors from the Ruhr area in the autumn of 1945.[30]

It is in this context, where the emphasis was on disabling Germany's potential as a competing empire, that the US and the other Allies decided to hold an international trial at Nuremberg.

(1) The IMT and the 'economic case'

The international trial to be held at the IMT formed a cornerstone of the Allies' post-WWII policy. It was the main public spectacle, or 'morality play', aimed at justifying the sacrifice of Allied manpower and resources. It also papered over the Allies' own failure to act sooner and more effectively against aggressive Nazism, to stop the Holocaust and also its failures with regard to Jewish refugees.[31] Moreover, the role of 'Nuremberg' was to help establish US moral authority as the rising superpower.[32] Henry Stimson, who is credited as the main driver for trials within the US government, 'saw the moralist agenda of outlawing war as one way to ensure greater security for an American-dominated economic empire'.[33] To achieve this objective, the main international trial at Nuremberg had to produce an historical record of war responsibility.[34] There was to be an emphasis on the

[27] See, eg, the Military Government of Germany, 'Control of IG Farben', in *Special Report of Military Governor US Zone* (1 October 1945) which details the measures taken to disable Farben's 'war potential'.

[28] A. Hilger, 'Die Gerechtigkeit nehme ihren Lauf'? Die Bestrafung deutscher Kriegs—und Gewaltverbrecher in der Sowjetunion und der SBZ/DDR', in Norbert Frei (ed), *Transnationale Vergangenheitspolitik: Der Umgang mit deutschen Kriegsverbrechern in Europa nach dem Zweiten Weltkrieg* (Göttingen: Wallstein Verlag, 2006), 180.

[29] K. Majchrzak, interview with Peter Weiss, 12 October 2008, Berlin. Peter Weiss, now Vice-President of Board of the Centre for Constitutional Rights in New York, in this interview relates his own experience as one of the 'Morgenthau Boys'.

[30] Tim Schanetzky, 'Unternehmer: Profiteure des Unrechts', in Norbert Frei (ed), *Hitlers Eliten nach 1945* (Munich: Deutscher Taschenbuch Verlag, 2003), 74.

[31] Richard D. McKinzie, interview with Josiah E. Dubois, 29 June 1973, Camden, NJ: *Harry S. Truman Library and Museum* [website], <http://www.trumanlibrary.org/oralhist/duboisje.htm> (accessed 27 February 2013) (Dubois Interview).

[32] Elizabeth Borgwardt, *A New Deal for the World: America's Vision for Human Rights* (Cambridge, MA: The Belknap Press of Harvard University Press, 2005). Cf. Martii Koskenniemi, 'Between Impunity and Show Trials', *Max Planck UNYB*, *6* (2002), 10.

[33] Borgwardt, above n 33, 75.

[34] Famously, Robert Jackson, IMT Opening Address, *International Military Tribunal, The Trial of German Major War Criminals by the International Military Tribunal Sitting at Nuremberg Germany* (commencing 20 November 1945).

totality of the war rather than on the detail.[35] Chief Prosecutor Robert Jackson stated:

> Our case against the major defendants is concerned with the Nazi master plan, not with individual barbarities and perversions which occurred independently of any central plan. The groundwork of our case must be factually authentic and constitute a well-documented history of what we are convinced was a grand, concerted pattern to incite and commit the aggressions and barbarities which have shocked the world.[36]

What became known as the 'economic case' was included as part of the overarching conspiracy charge. The Soviets agreed with the US on the importance of holding individuals responsible for aggressive war.[37] The shared understanding of the nature and causes of WWII as described above persisted at the IMT trial. The '*Leitmotif* of the IMT trial was exposing Nazism, militarism, economic imperialism in an "orgy of revelation" '.[38]

In the US's official view, what had enabled WWII to be started, and thus all its atrocities to be committed, had been the 'captur[e of] the form of the German state as an instrumentality for spreading their [Nazi] rule to other countries'.[39] This was to be reflected in the choice of defendants:

> Whom will we accuse and put to their defence? We will accuse a large number of individuals and officials who were in authority in the government, in the military establishment, including the General Staff, and in the financial, industrial and economic life in Germany who by all civilised standards are provable to be common criminals.[40]

The Soviet representative at Nuremberg, Aron Trainin stated that the industrialists and financiers' 'political position is clear: these were the masters for whom the Fascist State machine was zealously working', adding, 'the German financial and industrial heads must also be sent for trial as criminals'.[41]

From the very start it was clear that the 'economic case'—the part of the prosecution dealing with the economic causes of, and motivations for, the war and the responsibility of economic actors and policy-makers—would be key in the Nuremberg Trial.[42] Frankfurt School intellectual Franz Neumann was employed by the prosecution team, and his book *Behemoth: The Structure and Practice of*

[35] A delicate balance had to be drawn between showing the barbarity of the Nazis and retaining popular support for the trial. The film made about the trial, *Nuremberg: Its Lessons for Today*, was prevented from being finished and shown in the US, apparently because it was feared it would affect popular support also for the Marshall Plan (below). The film was recently finished: Schulberg Productions and Metropolis Productions, *Nuremberg: Its Lessons for Today* [website], <http://www.nurembergfilm.org/> (accessed 27 February 2013).

[36] Jackson Negotiations Report, Part III, above n 6.

[37] Hirsch, above n 4, 701. See also, Franz Leopold Neumann, 'The War Crimes Trials', *World Politics*, *2* (1949), 135, 139.

[38] Bloxham, above n 5, 203.

[39] Jackson Negotiations Report, Part III, above n 6.

[40] Jackson Negotiations Report, Part III, above n 6.

[41] Aron Naumovich Trainin (Andrey Yanuaryevich Vishinksi, ed), *Hitlerite Responsibility under Criminal Law* (London: Hutchinson & Co. Ltd, 1945), 84, 85.

[42] See, eg, Bush, above n 1, 1110–15.

National Socialism—which emphasized the role of economic actors in causing WWII—was a must-read for Nuremberg prosecutors.[43] The leading defendant at the IMT was Hermann Göring, Hitler's second-in-command, who had been in charge of readying the German economy for war. For the US prosecution, the key issue to be addressed was 'the Nazi plan to dominate the world and to wage aggressive war',[44] as had been partly discovered through the Kilgore Farben investigations.

When Justice Jackson and his staff commenced work in preparation for the trial, four indictment-drafting committees were established each dealing with a different core aspect of the war for which charges were to be brought. Committee One (Britain) dealt with the aggressive war charge; Committee Two (USSR) with war crimes and crimes against humanity in the East; and Committee Three (France) with equivalent crimes in the West. The Americans would prepare the 'common plan and conspiracy' charge.[45] The latter charge was to cover the pre-WWII story of Nazism, Hitler's seizure and exploitation of power, his plans and steps to occupy much of Europe, and his design to attack the United States. As the first count of the indictment, it would comprise the basic narrative of the case as a whole.[46] This committee was headed by Justice Jackson himself. As a vital part of this charge, the 'economic case' was entrusted to American lawyer Frank Shea.[47] Shea produced a memorandum in which he proposed for prosecution Hjalmar Schacht (former head of the Reichsbank and Minister of Economics, who had provided the financing for war production), Fritz Sauckel (a primary figure in the foreign forced labour programme), Albert Speer (an architect and later Minister of Armaments and Munitions), Walter Funk (Schacht's successor)[48] as well as Alfried Krupp and six other German industrial and financial leaders. Shea considered the guilt of the industrialists and financiers lay in the fact that 'they had given Hitler the material means to rearm Germany, *with full knowledge* that Hitler planned to use these armaments to carry out a program of German aggrandizement by military conquest'.[49]

From the mid-1930s the German economy had been geared towards heavy industry, which comprised the mining of coal (Germany's main natural resource) and the manufacture of iron and steel products. These industries were controlled by small number of large industrial and mining combines including Krupp, Flick, Thyssen, the state-owned Reich-Werks-Hermann-Göring and IG Farben. By a law of 15 May 1933, individual enterprises were compulsorily combined into cartels, while by a law of 30 January 1937, enterprises with a capital of less than 100,000 marks were subject to liquidation, and henceforth only companies with a capital of not less than 500,000 marks were permitted.[50] The concentration of capital in fewer hands gave rise to a powerful group of financial and industrial magnates.[51]

[43] Above n 7, and Bush, above n 1, 1108, fn 36.
[44] Bloxham, above n 5, 6.
[45] Taylor, above n 4, 79–80.
[46] Taylor, above n 4, 80.
[47] Taylor, above n 4, 90–2.
[48] Nazi Conspiracy and Aggression, Vol. I, Ch. VIII.
[49] Taylor, above n 4, 81 (emphasis in original).
[50] Trainin, above n 41, 83.
[51] *United States v Friedrich Flick et al* (*Flick*), US Military Tribunal Nuremberg, Judgment of 20 August 1947, in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, Vol. VI, Prosecution Opening Statement, 35–6.

Other aspects of the 'economic case' in the IMT Indictment included war crimes and crimes against humanity. Göring and the other defendants had to a greater or lesser extent been involved in the 'aryanization' of industries in the occupied countries in the expansion of the German *Lebensraum*. This involved the expropriation of foreign businesses and resources, as well as the recruitment and deployment of around five million slave labourers, part of whom had been work-to-death labour supplied by the Nazi extermination camps.[52]

The economic case gathered criticism from the start, with one critic arguing it was not the US's job to 'reform European economics' or 'turn a war crimes trial into an anti-trust case'.[53] The gradual change in attitude vis-á-vis Nuremberg must be seen in the context of the change in US leadership at this crucial time. On 12 May 1945 Roosevelt died and was succeeded by Truman—a more business-oriented leader:

> Of the 125 most important government appointments made by President Truman in the first two post-war years, 49 were bankers, financiers and industrialists, 31 were military men and 17 lawyers, mostly with Big Business connections. The effective locus of government seemed to shift from Washington to some place equidistant between Wall Street and West Point.[54]

The prosecution list was whittled down to twenty-four defendants.[55] In relation to the 'economic case', only the former ministers Sauckel, Funk and Speer were indicted, with Schacht, the 'redoubtable banker'[56] and Krupp as the sole industrialist, despite the fact that the prosecution teams, supported by OMGUS staff, had gathered much evidence to support the 'economic case'.[57]

The retention of Krupp, the 'main organiser of German industry', in the indictment made him the *pars pro toto* for German industry. However, there was disagreement among the different teams of lawyers working on the indictment as to whether Gustav Krupp, the man who had run the Krupp concern until 1941, or Alfried Krupp, his son, who had been the company's executive director before becoming sole owner in 1943, was the intended defendant. Eventually, Gustav the elder was selected, but his British captors, by way of a 'catastrophic blunder', failed to discover until days before the trial was to commence that he was—at 80 years of age—too ill and demented to stand trial.[58] The US immediately requested the court replace Gustav with his son Alfried on the indictment. The prosecution of at least one Krupp family member was in the public interest, explained in the words of Justice Jackson:

> The Krupp influence was powerful in promoting the Nazi plan to incite aggressive warfare in Europe. Krupps were thus one of the most persistent and influential forces that made this

[52] Office of United States Chief of Counsel for Prosecution of Axis Criminality, I *Nazi Conspiracy and Aggression* 349 (1946), esp. 'Chapter VIII—Economic Aspects of the Conspiracy' (Economic Aspects).

[53] Taylor, above n 4, 81.

[54] Howard K. Smith, *The State of Europe* (New York, NY: Knopf, 1949), 83, 95.

[55] Partly also due to British efforts to keep the list short and the trial brief (Taylor, above n 4, 90).

[56] Taylor, above n 4, 591. [57] Economic Aspects, above n 53. [58] Taylor, above n 4, 630.

war…Once the war was on, Krupps, both Von Bohlen and Alfried being directly responsible therefor, led German industry in violating treaties and international law by employing enslaved labourers, impressed and imported from nearly every country occupied by Germany…Moreover, the Krupp companies profited greatly from destroying the peace of the world through support of the Nazi program…The United States respectfully submits that no greater disservice to the future peace of the world could be done than to excuse the entire Krupp family.[59]

The request was rejected. Apparently the British objected on the grounds that allowing it would delay the start of the trial.[60] Although what might have been the first ever international trial of an industrialist was thus curtailed, its shadow was still present at Nuremberg. The IMT decided against formally trying Krupp *in absentia*, but *did* retain the charges against him in the indictment,[61] which were read out in court on the first day of the trial. Moreover, the case against Krupp was still explicitly made, for example in the US Prosecution team's presentation on Count One on day four of the trial.[62]

In addition, the economic case more generally featured prominently in the evidence presented by the US team at Nuremberg. Prosecutor Sidney Alderman, for example, presenting on the aggressive war charge cited the 'Hossbach Notes' in evidence to show that Hitler himself had also conceptualized the war as one of economic imperialism—the objective was conquest of a sufficient living space for food production for the German people plus the dominance of global trade and commerce.[63]

Where the trial had focused on Göring's role as, 'in theory and in practice…the economic dictator of the Reich',[64] the IMT Judgment illustrates this role while strongly implicating the absent industrialists. The judges recount how, in November 1932, a petition signed by leading industrialists and financiers had been presented to President Hindenburg, calling upon him to entrust the Chancellorship to Hitler.[65] Subsequently, according to evidence submitted to the Tribunal:

[59] Answer of the United States Prosecution to the Motion on Behalf of Defendant Gustav Von Krupp Von Bohlen, 12 November 1945, *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, 134ff.

[60] Order of the Tribunal Rejecting the Motion to amend the Indictment, dated 15 November 1945, in I TWC, 146, and see, Memorandum of the British Prosecution on the motion, in I *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, 139. They had promised instead to cooperate on a second international trial in which Krupp could be tried (Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford University Press, 2003), 24).

[61] Indictment of the International Military Tribunal, I *The Trial of German Major War Criminals by the International Military Tribunal Sitting at Nuremberg Germany* 27, 1947 (IMT Indictment).

[62] Nuremberg Trial Proceedings, Volume II, Day Four—Continuation of Colonel Storey's Presentation on Count 1, 222–3 and see the underlying prosecution file, a summary of which is published in Nazi Conspiracy and Aggression, Volume 2, Chapter XVI, Part 13.

[63] Nuremberg Trial Proceedings, Volume II, Day Five—Sidney Alderman's Presentation on Aggressive War, 261–5.

[64] IMT Judgment in International Military Tribunal, Judgment of 1 October 1946, in I *The Trial of German Major War Criminals by the International Military Tribunal Sitting at Nuremberg Germany* 171, 1947 (IMT Judgment), 183.

[65] IMT Judgment, 177.

On the invitation of Goering, approximately 25 of the leading industrialists of Germany, together with Schacht, attended a meeting in Berlin on 20 February 1933. This was shortly before the German election of 5 March 1933. At this meeting Hitler announced the conspirators' aim to seize totalitarian control over Germany, to destroy the parliamentary system, to crush all opposition by force, and to restore the power of the Wehrmacht. Among those present at that meeting were Gustav Krupp, four leading officials of the I.G. Farben Works, one of the world's largest chemical concerns; Albert Vogler, head of United Steel Works of Germany; and other leading industrialists.[66]

At this meeting, Göring opened an election fund (into which the industrialists contributed) to support Hitler in the March elections. Göring predicted these elections would be Germany's last.[67]

A month after the meeting between Göring and the industrialists, Krupp submitted to Hitler—on behalf of the Reich Association of German Industry—a plan for the reorganization of German industry. Krupp is cited in the Judgment as having stated that the plan was 'characterised by the desire to coordinate economic measures and political necessity', and that 'the turn of political events is in line with the wishes which I myself and the board of directors have cherished for a long time'.[68] The industrialists' plan was adopted.[69]

So while the US administration's support for the economic case waned, its legal officers still followed through on the initial sentiment. The IMT Judgment surmised, '[i]n this reorganization of the economic life of Germany for military purposes, the Nazi Government found the German armament industry quite willing to co-operate'.[70] Moreover, the Judgment related how industrialists picked the rich fruits of aggressive war and participated directly in the Holocaust. This was exemplified by Krupp's extensive use of slave labour at his plant in Essen, where 'punishments of the most cruel kind were inflicted on the workers'.[71]

The lingering wish (strongest among the US Prosecution team) to actually prosecute industrialists became one of the reasons the US went ahead with the 'subsequent proceedings' at the NMT.[72] Both Robert Jackson and his successor as Chief Prosecutor, Telford Taylor, pushed hard for the opportunity to try representatives of all sections of the German elite, including members of relevant professional groups, including the industrialists. However, by now the tide was irrepressibly turning, and the US lawyers started to face more resistance from the US government—supported in this respect by the increasingly hostile home media.[73]

[66] Economic Aspects, above n 52.

[67] IMT Judgment, above n 64, 184. Schacht was acquitted (Soviet judge Nikitchenko dissenting), as the Court found his knowledge of an impending aggressive war not proven beyond reasonable doubt (IMT Judgment, above n 64, 506–7). On the impact of Schacht's acquittal on the industrialists' cases, see Bush, above n 1, 1124.

[68] IMT Judgment, above n 64, 183.

[69] Economic Aspects, above n 52.

[70] IMT Judgment, above n 64, 419.

[71] IMT Judgment, above n 64, 462.

[72] Above n 8; Bush above n 1, 1239.

[73] See, eg, Donald Bloxham, 'British War Crimes Trial Policy in Germany, 1945–1957: Implementation and Collapse', *Journal of British Studies*, *42* (2003), 97.

(III) The Turnaround: From Germany is our Problem to Germany is our Business

In the spring of 1947 clearer signs started appearing of a changing Allied policy towards Germany, from one where Germany was to be publicly castigated and disabled (in trials and through economic policies as envisaged in the Morgenthau Plan) to one where Germany was to be rehabilitated into the world community of states and its economy rebuilt.[74] Here I focus on how this change (effectively, the start of the Cold War) was reflected in the US leadership's decision-making regarding the industrialists' trials, and subsequently (Section IV) on the clearly perceptible impact it had in the proceedings and the decisions of the tribunals.

Individual members of the US administration disagreed strongly on appropriate US policy towards Germany.[75] Morgenthau relates how already during WWII orders were given to the military to spare German industrial plants.[76] In his memoirs, Dubois describes a secret State Department memorandum setting out its 'post-war program' relating to in kind reparations payments from Germany.[77] Such reparations could form a public justification for sparing, and where necessary rebuilding, Germany's productive capacity, as well as retaining US-German trade ties. However, the programme remained secret as at that point public and key political support was still behind the pacific, 'pastoralized' Germany as proposed in Morgenthau's plan. Morgenthau, sensing support for his plan waning, reinforced his stance by publishing it as a book entitled *Germany is our Problem*.[78]

Over time, however, Morgenthau lost ground.[79] Dubois tells of seeing a second secret memorandum, circulated within the US delegation at Potsdam. According to this memo, the US goal now was 'rebuilding a strong Germany as a buffer against Communism'.[80] While the Potsdam Agreement (and occupation directive JCS1067, on which much of Potsdam was based)[81] mirrored the Morgenthau Plan, Dubois states, 'of course, it was never followed through. The US officials did do just

[74] See generally, John Gimbel, 'On the Implementation of the Potsdam Agreement: An Essay on U.S. Postwar German Policy', *Political Science Quarterly*, *87* (1972), 242–69.

[75] Generally, see Gimbel, above n 74. According to Maguire, the US Nuremberg Prosecution staff 'included a disproportionate number of Harvard Law School graduates, former New Dealers, and liberal democrats': Peter Maguire, *Law and War: International Law and American History* (New York, NY: Columbia University Press, 2010), 117.

[76] H. Schild (ed), *Das Morgenthau Tagebuch—Dokumente des Anti-Germanismus* (Leoni am Starnberger See: Druffel Verlag, 1970), 64.

[77] Dubois Interview, above n 31, 13.

[78] Morgenthau, above n 25; Schild, above n 76, 64.

[79] Exceptions made to Law No.56 to allow for the rehabilitation of German industry are detailed in: Office of the Military Government for Germany (US), *Special Report of the Military Governor: Ownership and Control of the Ruhr Industries,* November 1948.

[80] Dubois Interview, above n 31, 34.

[81] Directive to Commander-in-Chief of United States Forces of Occupation Regarding the Military Government of Germany, April 1945 (JCS1067); US Department of State, *Foreign Relations of the United States: European Advisory Commission: Austria, Germany*, Vol. III (Washington DC: US Government Printing Office 1945), 484; and generally, Dubois Interview, above n 31.

what Morgenthau was afraid of, and in effect what the State Department memorandum recommended'.[82] A strong, indentured economy was more attractive than a pastoralized state. Shortly after Potsdam Morgenthau was 'in effect…fired by Truman'.[83]

The turnaround was not complete at this point, though, and elements of the plan persisted for some time. For example, the work of the OMGUS Decartelization Branch—staffed by, the 'Morgenthau Boys'[84]—continued for two years after Henry Morgenthau's departure. Many items of machinery were shipped to the United States and the other Allies by way of reparations payment. The IG Farben Control Commission, which was run by all four occupation powers, split the Farben cartel into forty-seven parts, including the four sections that had only come together years before: Hoechst, Agfa, Bayer and BASF.[85] The entire German economy came to be strictly controlled by the occupation authorities. OMGUS passed anti-cartel laws that considered any enterprise with more than 10,000 employees prima facie in violation.[86] Secret programmes were underway to control and harvest German scientific development. Thousands of industrial patents, as well as hundreds of scientists were transferred to the US in 'Operation Paperclip'.[87]

The 'Restatement of Policy on Germany' was US Secretary of State James Byrnes' public announcement of the turnaround on 6 September 1946. In his speech, Byrnes raised the issue of the political and economic future of Europe: 'Germany is a part of Europe and recovery in Europe, and particularly in the states adjoining Germany, will be slow indeed if Germany with her great resources of iron and coal is turned into a poorhouse'.[88] In this statement Byrnes effectively echoed Soviet Foreign Minister Molotov's speech on Germany's economic future at the Paris Peace Conference in July 1946. However, unlike Molotov, Byrnes omitted mention of the industrialists' role in WWII, a notion that by then was starting to disappear from 'Western' discourse, and would disappear all but completely after the subsequent trials.[89]

In March 1947 Truman announced the 'Truman Doctrine' promising economic support to those 'states resisting attempted subjugation' (read: to communism).[90] Soviet representative Zhdanov responded with the 'two camps' speech in which he repeated the view that capitalist imperialism, personified in the directors of

[82] Dubois Interview, above n 31, 32, 33.

[83] J. Blum (ed), *From the Morgenthau Diaries*, Vol. 3 (Boston, MA: Houghton Mifflin 1967), 400–20, 451; Dubois Interview, above n 31, 25.

[84] Richard D. McKinzie, interview with Bernard Bernstein, 23 July 1975, New York, NY: *Harry S. Truman Library and Museum* [website], <http://www.trumanlibrary.org/oralhist/bernsten.htm> (accessed 27 February 2013); Bernstein Farben Report, above n 7.

[85] 'Control of IG Farben', *Special Report*, above n 27.

[86] *Special Report*, above n 85.

[87] Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group, *Final Report to the United States Congress*, April 2007.

[88] US Department of State, *Documents on Germany 1944–1985* (Washington DC: Department of State, 1985), 91–9.

[89] Vyacheslav Mikhaylovich Molotov, *Speeches of V.M. Molotov, Minister for Foreign Affairs of the USSR and Head of the Soviet Delegation at the Conference* (London: Soviet News, 1946).

[90] John Merriman, *A History of Modern Europe*, Vols. 1 & 2 (New York, NY: 3rd edn, W.W. Norton & Co 2009), 119.

the cartels, was the true perpetrator of WWII.[91] By this point hunger was widespread in Germany[92] and there was real fear Germans would turn to communism. Acheson remarked that the US was at 'the point where we see clearly how short is the distance from food and fuel either to peace or to anarchy'.[93] In July 1947 JCS1067 was replaced with JCS1779, which codified the turn in US policy and stated that '[a]n orderly, prosperous Europe requires the economic contributions of a stable and productive Germany'.[94] German and generally Western European recovery took off, largely through the Marshall Plan announced on 5 June 1947,[95] which aimed to modernize Western European industry and remove barriers to trade among European countries and between Europe and the US.[96] According to the US leadership, the objective of the Marshall Plan was only in part humanitarian—rather, it was 'chiefly…a matter of national self-interest'.[97] The Plan both stimulated the dollar and US industry and services (as the aid largely took the form of financing of purchases to be made from US corporations) and provided leverage for building 'political and economic stability'.[98] For example, Marshall Aid was used to pressure French and Italian governments not to appoint communists to ministerial posts.[99] Combining this with a leadership position in the International Bank for Reconstruction and Development, the International Monetary Fund and the nascent international trade regime, the US was able to remake the economic configuration of the world in its image.[100]

When Marshall presented Molotov at the Paris Economic Conference with a plan to stimulate only agricultural development in Eastern Europe, Molotov walked out of the meeting in one of the first major public clashes of the Cold War. On the Eastern side, the Cominform, the coordinating mechanism for all communist parties, was inaugurated in September 1947 as the successor to the Comintern, and Zhdanow was installed as its chair. Zhdanow also expressed opposition to the Marshall Plan, which to communists (in Western and Eastern Europe alike) enabled American imperialism through the medium of US

[91] H. Wentker, *Die juristische Aufarbeitung von NS-Verbrechen in der Sowjetischen Besatzungszone und in der DDR* (Baden-Baden: Kritische Justiz, 2002), 63.

[92] Lucius Clay, *Decision in Germany* (London: William Heinemann, 1950), 262–84.

[93] D. Acheson, 'The Requirements of Reconstruction', address made before Delta Council at Cleveland, MS on 8 May 1947, *Department of State Bulletin* (18 May 1947), 992 (Acheson Reconstruction).

[94] Directive to the Commander in Chief of United States Forces of Occupation of Germany (JCS 1779), Germany 1947–1949, 33–41, *Department of State Bulletin* (27 July 27 1947), 186–93.

[95] G. Marshall, 'European Initiative Essential to Economic Recovery', remarks by the Secretary of State at Harvard University on 5 June 1947, *Department of State Bulletin* (15 June 1947).

[96] Merriman, above n 90, 1120–1.

[97] Acheson Reconstruction, above n 93, 992.

[98] Acheson Reconstruction, above n 93, 992–3.

[99] Merriman, above n 90, 1120.

[100] See Ernest Mandel, *The Meaning of the Second World War* (New York, NY: Verso, 1986), at 168: 'US imperialism could restrain itself because it had a way out economically. The option it chose in 1946–48 was to concentrate its efforts on the political and economic consolidation of capitalism in the main imperialist countries, and to grant them sufficient credit and space for development to initiate a world-wide expansion of the capitalist economy, on the basis of which capitalism would be politically and socially stabilised in its main fortresses.'

corporations.[101] Soviet power in Eastern Europe grew as Soviet troops took control of the Czech government in January 1948 and in June 1948 blocked foreign trains and truck routes into Berlin, in protest against US, British and French plans for a self-governing Western German zone. The latter sent shockwaves through the US trial teams at Nuremberg and some made the decision to take their families home.[102] West German commentator Friedhelm Kröll summarizes the *Umorientierung* (turnaround) as follows: 'With the re-formation of political camps during the Cold War and the open warfare in Korea, the involvement of the young Federal Republic into the Western alliance weighed heavier than crime and punishment of Nazi crimes.'[103] East German commentators accused the US of 'liquidating Potsdam'.[104]

It is against this backdrop that we must imagine the efforts of US lawyers such as Jackson and Taylor to persuade the US political leadership to allow further trials.[105] That these took place at all can partly be brought down to the tenacity of these lawyers.[106] Justice Jackson, in his report on the IMT Judgment, reminded the US government that:

> The war crimes work that remains to be done, is to deal with the very large number of Germans who have participated in the crimes [and who] remain unpunished. There are many industrialists, militarists, politicians, diplomats, and police officials whose guilt does not differ from those who have been convicted except that their parts were at lower levels and have been less conspicuous.[107]

Jackson noted that his successor, Brigadier General Telford Taylor, had already 'prepared a programme of prosecutions against representatives of all the important segments of the Third Reich including a considerable number of industrialists and financiers, leading cabinet ministers, top SS and police officials, and militarists'.[108] The initial proposal had been for a second international trial.[109] British Foreign Secretary Orme Sargeant, however, feared that such a trial would become a 'battle

[101] United States Economic Cooperation Administration, *A Report on Recovery Progress and United States Aid* (February 1949), 142–4 and generally, Chapter VI: 'Communist Opposition to the ERP', 141–50.

[102] Dubois, above n 8, 338.

[103] Friedhelm Kröll, 'Fall 10: Der Krupp-Prozess', in G. and R. Blasius (eds), *Der Nationalsozialismus vor Gericht: Die alliierten Prozesse gegen Kriegsverbrechen und Soldaten 1943–1952* (Frankfurt: Fischer Taschenbuch Verlag, 1999), 176.

[104] S. Kahn, 'Preface', in Richard Sasuly, *IG Farben* (Berlin: Volk und Welt, 1952), 6.

[105] On US domestic opposition to trying Nazis, see Maguire, above n 75, 119–20; Bush, above n 1, 1230–1.

[106] Bloxham, above n 60, 55.

[107] 'Jackson Report to the President of October 7', 1946, attached to *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials* (London, 1945) (Jackson Final Report).

[108] Jackson Final Report, 435.

[109] Telford Taylor, Final Report to the Secretary of the Army on the Nuernberg War Crimes Trial Under Control Council Law No. 10 (Washington, DC: US Government Printing Office, 1949), 22–7. For Jackson's view on international versus US military trials, see Jackson Final Report, above n 108. For commentary see Heller, above n 22, 9–24; Bush, above n 1, 1123–9; Donald Bloxham, '"The Trial that Never Was": Why There Was No Second International Trial of Major War Criminals at Nuremberg', *J. Hist. Ass'n*, *87* (2002), 46–7.

between capitalism and communism'.[110] Jackson's response shows industrialists were the prime target of further trials: '[I]f [the other Allies] were unwilling to take the additional time necessary to try industrialists in this case... [t]he quickest and most satisfactory results will be obtained, in my opinion, from immediate commencement of our own cases according to plans which General Taylor has worked out'.[111] This is what happened.

In the trials of the industrialists at the US NMT we can see the change in the broader geopolitical landscape and US attitude reflected. On a very practical level, for example, General Clay was ordered by JCS1779 to 'make every effort to facilitate and bring to early completion the war crimes program'.[112] In 1947 he put direct pressure on Taylor to wrap up the NMT trials—before they had even begun.[113] Taylor's original plan to prosecute up to four hundred individuals had to be revised to 177.

The wish—and decision—to try individual industrialists in this changing landscape may seem contradictory at first glance. It is less so when we contrast the idea of trying them with what actually happened in the trials and decisions, as I illustrate in the next section. Below the surface, a deeper US need can be discerned: the need to reassure American industrialists, perhaps counter-intuitively *through these trials*, that production for the Korean and other, potentially *aggressive*, wars would not lead to their prosecution.[114] From this perspective, the Tribunals' task was to distinguish culpable involvement with an evil regime from innocent 'business'.[115]

(IV) The Trials of the Industrialists: From Morality Play to *Théâtre De L'absurde*

The trials at the NMT were based on Control Council Law No. 10 (CCL10) of December 1945, which authorized each of the four German Occupation Zone Commanders to arrest suspected war criminals and to establish 'appropriate tribunals' for their trial.[116] Of the trials carried out by the Allies and eventually also the German courts,[117] those of the US, which took place in the same Nuremberg courthouse as the IMT trial, are by far the best documented and most widely known.

[110] Donald Bloxham, *Genocide, the World Wars, and the Unweaving of Europe* (Middlesex: Vallentine, Mitchell and Co., 2008), 149.

[111] Jackson Final Report, above n 109, 436.

[112] JCS 1779, [10].

[113] Clay, above n 94, 252.

[114] Dubois, above n 10, 21.

[115] Dubois, above n 10, 20. See also, Jeßberger, 'Die I.G. Farben vor Gericht', above n 1; Jeßberger, 'On the Origins of individual criminal responsibility under international law for business activity: IG Farben on Trial', above n 1.

[116] Control Council Law No. 10 (CCL10), Article II 2, 20 December 1945, reprinted in Taylor, Final Report, above n 109, 250.

[117] As per CCL10, Article III, the French, British and Soviet commanders granted German courts' jurisdiction.

It is these trials that are now once again cropping up in the literature around business and international criminal law,[118] and indeed in recent legal practice.[119]

My task in this section is to show how the realignment of the geopolitical landscape and internal dynamics of the US state-capitalist trust manifested themselves directly in the trials and their aftermaths. Of the trials held at the NMT, this occurs most clearly in the *trials of the industrialists*. Here, the recent realignment manifests in four distinct, interrelated ways. First, the trials were marked by excessively conciliatory language employed by the judges towards, or about, the defendants. Second, facts and charges that were admitted by the defendants were considered 'not proven' or ignored by the judges, and third, the necessity and superior order defences were allowed to be used in ways specifically contradicting the main IMT decision and CCL10. Apart from the liberal application of exculpatory legal doctrines, the NMTs in the industrialists' cases were generous in other areas. For example, the NMTs accepted the defendants' ignorance regarding the plans for aggressive war and the fact of the Holocaust. Finally, these factors added up to the passing of very light sentences when compared to similar CCL10 convictions. Moreover, it was in the aftermath of the trials, in the extrajudicial review of sentences carried out by High Commissioner for Germany McCloy[120] and the reinstatement of many of the industrialists in their old positions, that capitalism's victor's justice was sealed.

As a general point, it can be said that the trials turned from a morality play into *théâtre de l'absurde*. *Théâtre de l'absurde*, a genre that emerged in the early post-war years, is characterized by a lack of formal structure or logical dialogue in the aftermath of a sudden loss of meaning or purpose. For example, Samuel Beckett's *Waiting for Godot* (1952) represents the impossibility of purposeful action and the paralysis of human aspiration.[121] Below, I give only some representative examples from the three industrialists' trials, the *Flick* case,[122] *Farben*[123] and *Krupp*.[124] There are many more.[125] I have added some factual context to each of the examples so

[118] See, eg, K.R. Jacobson, 'Doing Business with the Devil: The Challenges of Prosecuting Corporate Officials whose Business Transactions Facilitate War Crimes and Crimes Against Humanity', *Air Force Law Review*, *56* (2005), 167; G. Skinner, 'Nuremberg's Legacy Continues: The Nuremberg Trials' Influence on Human Rights Litigation in US Courts under the Alien Tort Statute', *Albany Law Review*, *71* (2008), 321. Many recent works on Nuremberg perpetuate incorrect or incomplete facts about the trials (Bush, above n 1, 1237).

[119] See, eg, the Nuremberg Scholars Amicus brief in support of the petitioners in *Kiobel v Royal Dutch Petroleum*, USSC 10-1491.

[120] Under Military Ordinance No. 7 (which established the tribunals) Article XVII (a), the Military Governor was authorized to reduce, mitigate or otherwise alter (but not raise) a sentence passed by the tribunals. While General Clay reviewed and confirmed sentences, his successor McCloy constituted a clemency board which would re-review sentences without involving or even informing the judges and prosecutors (see Maguire, above n 75, 166–8).

[121] *The Oxford Dictionary of Literary Terms* (Oxford: Oxford University Press, 2008), 1–2.

[122] *United States v Friedrich Flick et al* (*Flick*), above n 51.

[123] *United States v Carl Krauch et al* (*Farben*), *Trials of War Criminals before the Nuremberg Military Tribunals under CCL10*, Vol. VII.

[124] *United States v Alfried Krupp et al.* (*Krupp*), *Trials of War Criminals before the Nuremberg Military Tribunals under CCL10*, Vol. IX.

[125] G. Baars, 'Law(yers) Congealing Capitalism: On the (Im)possibility of Restraining Business in Conflict through International Criminal Law', Doctoral Thesis (University College London,

as to illustrate the role the leaders of these companies were said to have played in WWII and the Holocaust.

(1) Excessively conciliatory language

Throughout the three judgments, examples of the judges' use of excessively conciliatory language can be found, which stands in stark contrast with the language of the prosecution. The first example here is from the *Flick* case. Friedrich Flick and five other officials of the Flick Concern were accused of participation in the deportation of thousands of foreigners including concentration camp inmates and prisoners of war to forced labour in inhuman conditions including in the Flick mines and plants; spoliation contrary to the Hague Conventions of property in occupied France and the Soviet Union; participation in the persecution of Jews in the pre-war years through securing Jewish industrial and mining properties in the 'Aryanization' process, and knowing participation (of defendants Flick and Steinbrinck) in SS atrocities through membership in the 'Circle of Friends of Himmler' (a select group of industrialists and SS officers).[126] The Flick group of enterprises included coal and iron mines, steel producing and fabricating plants. It was, at the time, the largest steel combine in Germany, rivalled in size only by Krupp AG.[127] Chief Prosecutor Telford Taylor opened this first industrialist case to be tried by the Americans with the nature of industry's responsibility:

> What we are here concerned with is no mere technical form of participation in crime, or some more or less accidental financial assistance of the commission of crimes. The really significant thing…is the fact that the defendants assisted the SS and the Nazi regime with their eyes open and their hearts attuned to the basic purposes which they were subsidising. Their support was not merely financial. It was part of a firm partnership between these defendants and the Nazi regime that continued from before the Nazi seizure of power to the last days of the Third Reich.[128]

The final judgment in the *Flick* case (and the other industrialists' cases) stands in stark contrast to this indictment. On the count of participation in the SS crimes through membership of the Himmler Circle, Flick and Steinbrinck were found guilty. As one of its most absurd proposals, the Tribunal suggested, that rather than forming an active part of the deliberations about the upcoming aggressive war, the defendants may just have attended the Himmler Circle's meetings for its 'excellent dinner'.[129]

Moreover, the Tribunal attempted to show how Flick and company—despite attending these regular dinners—had not had the required knowledge to render them guilty of war crimes and crimes against humanity in relation to the killings and other atrocities carried out in the Nazi extermination camps. It recounted how:

2012) includes detailed treatment of the *Ministries Case* and *Pohl* as well as the other zonal trials (at 119–74).

[126] *Flick,* above n 51, 3 (Indictment).
[127] *Flick,* above n 51, 34 (Opening Statement for Prosecution).
[128] *Flick,* above n 51, 104.
[129] *Flick,* above n 51, 1218 (Judgment).

[i]n 1936 [Himmler] took members of the Circle on an inspection trip to visit Dachau concentration camp which was under his charge. They were escorted through certain buildings including the kitchen where they tasted food. They saw nothing of the infamous atrocities perhaps already there begun. But Flick who was present got the impression that it was not a pleasant place.[130]

Again, this section bears an excessively conciliatory tone, which here interferes with the finding of knowledge with regards to the facts of the Holocaust, which had been deemed (including by the IMT) common knowledge among the German people at the time.[131]

The other 'reconciliation' that appears in the trials is that between German and US industry. *Farben* prosecutor Dubois had been instructed by the US War Department, before taking up his role, not to charge the *Farben* defendants with aggressive war.[132] The US Government feared DuPont and other US industrialists' reaction. However, Dubois went ahead with the charge. It is clear from their statements that the industrialists on trial were aware of criticism of the trials voiced by US business leaders in the media—in particular, since Farben had had close relationships with Standard Oil, this trial had been watched closely by the home public.[133] The defendants were aware that the US in changed political times would come to rely on its own industrialists, evidenced in Krauch's closing statement:

When I heard the final plea of the prosecution yesterday, I often thought of my colleagues in the United States and in England and tried to imagine what these men would think, when they heard and read these attacks hurled at us by the prosecution. For after all, they, too, are scientists and engineers; they had similar problems. They, like us, were called upon by the state to perform certain duties. That was true then, before the world war, and that is true now, as we know from information received from the United States. A citizen cannot evade the call of the state. He must submit and must obey.[134]

Seemingly in agreement with Krauch, the Tribunal acquitted the defendants of the charge of conspiracy to wage wars of aggression, finding that they had acted merely like ordinary citizens, who, although the majority of them supported the waging of war in some way, were not the ones who planned the war and led a nation. The Tribunal placed itself in opposition to the IMT on the role of industrialists, holding that the *Farben* defendants merely followed their leaders and offered no contribution to the war effort greater than any other normally productive enterprise.[135]

Most controversially, the Tribunal stated '[w]e reach the conclusion that common knowledge of Hitler's plans did not prevail in Germany, either with respect to a general plan to wage aggressive war, or with respect to specific plans to attack

[130] *Flick,* above n 51, 1218 (Judgment).

[131] IMT Judgment, above n 64, 480.

[132] Dubois, above n 8, 20.

[133] Taylor, Final Report, above note 109, 79.

[134] *Farben*, above n 123 1055 (Final Statements by the Defendants: Krauch). Krauch's lawyer had also said, 'I have to harp again on the old subject: that is, did not other countries and other peoples act in the same way? Replace IG by I.C.I. (Imperial Chemical Industries) for England, or du Pont for America, Montecatini for Italy, and at once the similarity will become clear to you': at 921 (Closing Statements for Defendant Krauch).

[135] *Farben,* above n 125, 1126.

individual countries'.[136] Here we can see another direct contradiction of the IMT, both regarding Germans' general knowledge and the *Farben* defendants' specific knowledge.[137] As briefly noted above, the IMT had detailed the planning and strategy meetings of Himmler's circle of Friends, of which *Farben* defendant Buetefish had been a part (with Flick and Rasche, amongst others).[138]

The *Farben* Tribunal played down the common interest between the industrial and political leaders. In support of the claim that the Farben leaders were well aware of, and perhaps more directly involved in planning the aggressive war for their own purposes, the prosecution had produced a letter in which Krauch argued for the takeover of neighbouring countries' industries, 'peaceably at first':

> It is essential for Germany to strengthen its own war potential as well as that of its allies to such an extent that the coalition is equal to the efforts of practically the rest of the world. This can be achieved only by new, strong, and combined efforts by all of the allies, and by expanding and improving the greater economic domain corresponding to the improved raw material basis of the coalition, peaceably at first, to the Balkans and Spain.[139]

Contrast this with the Tribunal's view:

> The defendants may have been, as some of them undoubtedly were, alarmed at the accelerated pace that armament was taking. Yet even Krauch, who participated in the Four Year Plan within the chemical field, *undoubtedly did not realise* that, in addition to strengthening Germany, he was participating in making the nation ready for a planned attack of an aggressive nature.[140]

Eventually the Tribunal concluded summarily on the further evidence submitted to it: 'This labour has led to the *definite* conclusion that Krauch did not knowingly participate in the planning, preparation or initiation of an aggressive war.'[141] If Krauch's level of knowledge did not suffice to find him guilty, then DuPont and the other US industrialists could rest assured.

(2) Facts and charges admitted considered not proven or ignored by the judges

One of the most absurd features of the trials was how certain facts and charges that were admitted in court by the defendants were considered 'not proven' or ignored by the judges. The *Farben* case was by far the most absurd case in this respect.[142] In this case the way facts and law are twisted, and the tone of the judges' statements, almost give the impression that the judges believed themselves to be involuntary actors in a play.[143] The judgment stands in stark contrast to evidence reported

[136] *Farben,* above n 125, 1107. [137] See, eg, IMT Judgment, above 64, 480.
[138] See also, *Farben*, above n 123, 1200. [139] *Farben,* above n 123, 1116.
[140] *Farben*, above n 123, Vol. VIII, 1114. [141] *Farben,* above n 123, 1117 (emphasis added).
[142] For a sustained critique, see Dubois, above n 8, 338–56.
[143] This impression is raised in the private papers of Judge Hebert: see, eg, Paul Hebert, 'Draft Dissent', *Nuremberg Trials Documents* (1948), Louisiana State University Law Centre Digital Commons, <http://digitalcommons.law.lsu.edu/nuremberg_docs/1> (accessed 27 February 2013).

in the US Congress and presented during the trial.[144] Von Schnitzler's extensive admissions made in interrogations[145] eventually 'did not mean anything, not even against himself'.[146]

On the slave labour charge, only in the Auschwitz context did the Tribunal find some evidence of the *Farben* defendants' initiative, but the area of criminal liability was still constructed very narrowly. Having considered many potential locations for a new synthetic rubber plant, on the recommendation of defendant Ambros, the small Polish village of Oświęcim was selected.[147] This became the site for Farben's main manufacturing plant, as well as for the Auschwitz concentration and extermination camp. Ambros visited the camp at Auschwitz in the winter of 1941–2 in company with some thirty important visitors (perhaps the Himmler Circle), and 'he saw no abuse of inmates and thought that the camp was well conducted'.[148] Once again, in the face of the overwhelming evidence presented at the IMT and NMT in relation to Auschwitz (including, for example, that as of the beginning of 1942 'the smell of death emanating from the crematorium would pucker the nose of anyone within half a mile'[149]), it appears odd for the judgment to adopt such description uncritically.

'Work-to-death labour'[150] at Farben's Auschwitz factory is described by the Tribunal in its judgment euphemistically as '[t]hose [workers] who became unable to work or who were not amenable to discipline were sent back to the Auschwitz concentration camp or, as was more often the case, to Birkenau for extermination in the gas chambers'.[151] Also, it is noted, '[t]he plant site was not entirely without inhumane incidents'.[152] Nevertheless the Tribunal adds, '[i]t is clear that Farben did not deliberately pursue or encourage inhumane policy with respect to the workers. In fact, some steps were taken by Farben to alleviate the situation. It *voluntarily and at its own expense* provided hot soup for the workers on the site at noon'.[153] When utilizing free 'work-to-death labour', however, this appears little like generosity and even less an exculpatory factor for the *Farben* defendants. The fact remained, as stated by the Tribunal, that 'the labour for Auschwitz was procured through the Reich Labour Office at Farben's request. Forced labour was used for a period of approximately three years, from 1942 until the end of the war'.[154] Only five of the twenty-four defendants were found guilty under count three. Dubois' final comment on the Tribunal's 'greatest exaggeration' in the case of defendant Ilgner was, '[t]he tribunal rewrote into innocence even the aggressive deeds he admitted, raising the clear implication that any society could be filled with such men with no danger whatever to the peace of the world'.[155] As well as falling into the current category of absurdism, the Tribunal also alludes to the next

144 See, eg, Bernstein Farben Report, above n 7.
145 See Osterloh, above n 19, 75.
146 *Farben* Indictment, above n 123, 47–9; Dubois, above n 8, 339.
147 *Farben*, above n 123, 1180.
148 *Farben*, above n 123, 1181.
149 Dubois, above n 8, 341.
150 Dubois notes worker deaths amounted to over 50,000: Dubois, above n 8, 342.
151 *Farben,* above n 123, 1183.
152 *Farben*, above n 123, 1184.
153 *Farben*, above n 123, 1185 (emphasis added).
154 *Farben*, above n 123, 1185.
155 Dubois, above n 8, 355.

category, that of finding the defendants had simply, innocently, been doing as they were told, or carrying on 'business as usual' in unusual circumstances.

(3) Howling with the wolves: Necessity used as a defence contrary to Nuremberg principles

Flick described his ostensible agreement with Nazi ideology as self-protective 'howling with the wolves'.[156] The Tribunal accepted the view that the defendants (except Flick and Weiss) acted under necessity,[157] forced by the 'reign of terror' employed by the Nazi regime:

> The Reich, through its hordes of enforcement officials and secret police, was always 'present', ready to go into instant action and to mete out savage and immediate punishment against anyone doing anything that could be construed as obstructing or hindering the carrying out of governmental regulations or decrees.[158]

This blanket interpretation of necessity could well be used to excuse any crime committed under order or decree of the Nazis. The *Flick* judgment in this aspect stands in sharp contrast to other non-industrialist decisions of the NMT.[159]

The generous use of necessity as a complete defence in these cases appears to be aimed at circumventing the bar on use of the 'superior orders' defence as a fundamental principle at Nuremberg.[160] CCL10 states, '[t]he fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation'.[161] At the IMT, 'the true test [for such mitigation], which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible'.[162] *Farben* defendant Schneider had told interrogators that no one in government forced Farben to build the factories at Auschwitz or to operate them.[163] The rubber quota had been set by Krauch himself and Farben produced in excess of government requirements.[164] Yet, the Tribunal found '[t]here can be but little doubt that the defiant refusal of a Farben executive to carry out the Reich production schedule or to use slave labour to achieve that end would

[156] Telford Taylor, 'Nuremberg Trials: War Crimes and International Law', *International Conciliation*, *450* (1949), 304.

[157] The NMTs do not employ a uniform understanding of the concept of necessity, which is also at times used interchangeably with 'duress'. For an overview, see, E. Van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague: TMC Asser Press 2003), 279–83.

[158] *Flick*, above n 51, 1200.

[159] For example in the Einsatzgruppen case necessity was understood to require an 'imminent, real and inevitable threat' (*US v Ohlendorf et al. VII Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, 91).

[160] Nuremberg Charter, Article 8. See, for example IMT Judgment, above n 65: 'Superior orders, even to a soldier, cannot be considered in mitigation where crimes as shocking and extensive have been committed consciously, ruthlessly and without military excuse or justification': at 493 (in relation to Keitel).

[161] CCL10, Article II4(b).

[162] IMT Judgment, above n 64, 447.

[163] Dubois, above n 8, 341.

[164] Dubois, above n 8, 341.

have been treated as treasonous sabotage and would have resulted in prompt and drastic retaliation'.[165]

In his dissent on the charges of slave labour, Judge Hebert disagreed with the necessity finding in the strongest terms, concluding that Farben directors had initiated rather than followed orders, and that Farben directors' will coincided with the government. Hebert called the Tribunal's finding of a Nazi threat to Farben 'pure speculation'.[166]

In the *Krupp* case we can see a remarkable variation of the IMT's reasoning on economic imperialism. Here, the Prosecution did not argue that the *Krupp* defendants were part of the 'Nazi conspiracy' in the meaning of the IMT decision, but that they had been part of a '*Krupp conspiracy*'. This was a manifestation of something altogether bigger:

> Nazism was, after all, only the temporary political manifestation of certain ideas and attitudes which long antedated Nazism, and which will not perish nearly so easily. In this case, we are at grips with something much older than Nazism; something which fused with Nazi ideas to produce the Third Reich, but which has its own independent and pernicious vitality.[167]

To ensure Krupp's own continually increasing profitability, it was said to have driven the state and military to colonial expansion.[168] Dismissing the charge, Judge Wilkins considered that Krupp's expansionism since the 1920s merely meant Krupp had acted *in the firm's financial interest* as behoves a businessman.[169] From the condemnation of the state-corporate economic imperialism in the IMT (see above) to this decision, it appears the NMT came full circle: Krupp's 'conspiracy' was simply business as usual.[170]

The *Krupp* Tribunal then considered the remaining spoliation and forced labour charges. The Tribunal found, in contrast to the *Farben* decision (above), in terms of *knowledge* with regard to the Krupp firm's activities at Auschwitz that the persecution of Jews by the Nazis was 'common knowledge not only in Germany but throughout the civilised world' and that the firm's officials, could not *not* have known.[171]

[165] *Farben*, above n 123, 1174.

[166] *Farben*, above n 123, 1306 (Judge Hebert's Dissenting Opinion on Count Three of the Indictment).

[167] See *Krupp,* above n 124, 412 (Judge Wilkins' Separate Opinion on Counts 1 and 4).

[168] Kröll connects this with Max Weber's 'Wilhelminismus': 'die Allianz zwischen Großindustrie und Pseudoaristokratie mit der Folge der Derationalisierung der deutschen Weltpolitik': F. Kröll, *Fall 10: Der Krupp-Prozeß*, in G. Ueberschär, *Der Nationalsozialismus vor Gericht: die alliierten Prozesse gegen Kriegsverbrecher und Soldaten 1943–1952—Nazism up in court: the Allies' trials against war criminals and soldiers from 1943 to 1952*, (Frankfurt am Main: Fischer Taschenbuch Verl, 1999).

[169] *Krupp*, above n 124, 412. See also, Taylor, above n 156, 309.

[170] Likewise, the *Farben* Tribunal considered that company a 'simple prototype of "Western capitalism"': Dubois, above n 8, 355.

[171] *Krupp*, above n 124, 1434.

(4) 'Sentences light enough to please a chicken thief'

Compared to sentences in cases where similar facts were alleged and established, the industrialists in *Flick* and *Farben* received, as Dubois put it in his comment on the *Farben* judgement, 'sentences light enough to please a chicken thief'.[172] Flick was sentenced to seven years' imprisonment, Steinbrinck to five, and Weiss to two-and-a-half, while the other three defendants were acquitted on all counts.[173] In his report, Taylor calls the *Flick* judgment 'exceedingly (if not excessively) moderate and conciliatory.'[174] In the *Farben* case, Krauch was sentenced to six years, Ambros to eight, and the others received sentences between one-and-a-half and eight years. Four were acquitted. The defendant Ilgner was considered innocent even of the aggressive deeds he had admitted.[175] By comparison, in the *Justices* case, that same week, four life sentences were imposed, and in the *Pohl* case against the SS Economic and Administrative Office (who had handled the logistical and administrative side of slave labour) four death sentences were imposed, and no prison sentence below ten years with four of twenty or more.[176] Dubois surmises, 'no doubt [the *Farben* judges] were influenced somewhat by our foreign policy'.[177]

The comparatively heavy sentences in *Krupp* ranged between six and twelve years for ten defendants, and three years for one, and included the forfeiture of Alfried Krupp's real and personal property.[178] After the IMT's 'Krupp *snafu*', Taylor had commented that 'Alfried Krupp was a very lucky man, for, had he been named, he would almost certainly have been convicted and given a very stiff sentence by the International Military Tribunal'.[179] With this in mind, the Krupp defendants' trial seems 'amicable' indeed.[180]

The NMT also convicted one banker, Rasche, the director of the Dresdner Bank, as part of the *Ministries* case.[181] His trial also featured the four factors of the NMT *théâtre de l'absurde*.[182] The popular German conception of his role is encapsulated in the saying, '*Wer marschiert da hinter dem ersten Tank? Das ist Doktor Rasche von der Dresdner Bank*.'[183]

The NMT trials of the industrialists left both prosecutors and judges with much agonized soul-searching, evidenced in their writing on the matter.[184] According

[172] Dubois, above n 8, 339. [173] *Krupp*, above n 124, 1223.
[174] Taylor, above n 156, 187. [175] Dubois, above n 8, 355.
[176] *United States v Josef Altstoetter et al.* (*Justice*) in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, Vol. III; *United States v Oswald Pohl et al.* (*Pohl*) in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, Vol. V.
[177] Dubois, above n 8, 357. [178] *Krupp*, above n 124, 1450.
[179] Taylor, above n 4, 94.
[180] This is the term used in Jeßberger, 'Die I.G. Farben vor Gericht', above n 1 and Jeßberger, 'On the Origins of Individual Criminal Responsibility', above n 1.
[181] *United States v Ernst Weizsaecker et al* (*Ministries*) in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, Vol. XIV.
[182] Heller comments on the 'unprincipled lenience' of the tribunal towards Rasche, based on his status as a private businessman (Heller, above n 22, 5, 288–9).
[183] 'Who is that marching behind the first tank? That's Dr Rasche of the Dresdner Bank' (my translation). I am grateful to Fabian Schellhaas, PhD Candidate, Humboldt University Faculty of Law for this phrase.
[184] See, generally, Taylor, above n 156; Dubois, above n 8; Sasuly, above n 104.

to Dubois, Judge Hebert had been writing a dissenting opinion on the Farben aggressive war charge up to the very last day, stating that 'by the time we reached the end [of the trial] I felt that practically every sentence of the indictment had been proved many times over'.[185] According to Dubois, Hebert probably changed his mind about submitting his dissent out of fear of communism, considering the trend of events in 1948.[186] Taylor also considered the evidence against Farben, especially on the aggressive war charge, to have been the strongest of all the industrialist trials.[187] In the opinion Hebert eventually filed, six months after the majority judgment, he states: 'The issues of fact are truly so close as to cause genuine concern as to whether or not justice has actually been done because the enormous and indispensable role these defendants were shown to have played in the building of the war machine which made Hitler's aggression possible.'[188]

What I have tried to show in this section is how international criminal law was shaped and manipulated to produce outcomes that were materially desirable—resulting in, at times, absurd contradictions. The outcomes of the trials are not the result of some putative 'autonomous' legal process, but rather, follow the logic of capitalism and bear the imprint of the changing facts and relationships of the material base. Yet, the contradictions inherent in the fact that these trials took place at all, their outcomes, and salient details such as the fact that throughout their trial detention the accused's companies were still running (with the help of powers of attorney and board meetings in prison cells)[189] were to give rise to something bigger, international criminal law's effective deployment in the service of capitalism's victor's justice.

(V) Aftermath: Capitalism's Victor's Justice

Elsewhere I have compared the US trials to the little-known post-WWII trials on the Eastern front. Although the US and USSR governments had also stated that the Eastern front war had been a joint military-industrial war for markets and resources (again revealed in the documentation),[190] the International Military Tribunal in Tokyo omitted to indict any of the leaders of the Japanese *zaibatsu*. While later Allied military trials of camp guards also revealed the extent of forced labour employed by the *zaibatsu*, the US occupation authorities opted to abandon prosecution plans and instead to utilize the industrial elites (in a 'shock doctrine' economic reform programme) to mobilize against a Japanese turn to communism.[191]

[185] Dubois, above n 8, 347. [186] Dubois, above n 8, 355. [187] Taylor, above n 156, 314.
[188] *Farben*, above n 123, 1212 (concurring opinion of Judge Hebert on charges of crimes against peace).
[189] Dubois, above n 8, 37; Schanetzky, above n 30, 77.
[190] See further Baars, above n 125, esp. Chapter 3B (175–210) and also generally, Yuma Totani, *Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Cambridge, MA: Harvard University Press, 2008).
[191] Baars, above n 125, 175–210.

In Germany, the other Allies also tried industrialists in their respective zones of occupation. Each of the Allies' own political priorities finds its reflection in these trials. For France, for example, it was important to find a balance between a 'business-friendly' judgment and creating a precedent that would enable expropriation of business assets from those who had collaborated in the War.[192] The Saar magnate Hermann Röchling and several associates were tried by the French military tribunal for, among others, participating in the war of aggression.[193] Their indictment stated that:

> [i]f the 'Directors of German Enterprises'...plead that they only attached themselves to Hitler in order to oppose communism or 'Social Democracy', there exists no doubt that the profound reason for their attitude can be sought in their desire, long before the coming of national socialism, to extend their undertakings beyond the frontiers of the Reich.[194]

Hermann Röchling was accused of, *inter alia*, urging Hitler to invade the Balkans so as to appropriate the Balkan enterprises.

While convicted of waging aggressive war in the first instance, on appeal in 1949, the Supreme Court of the French Military Government in the French Zone of Occupation[195] acquitted Hermann Röchling. According to the French court, the IMT had set the bar for this charge very high by acquitting Speer of this charge and holding that only those involved in policy-making and planning could be convicted.[196] The *Röchling* defendants' sentences were significantly reduced in their appeal,[197] showing a softening of French attitudes also.

For the British, the main motivator for zonal trials was prosecuting those who had killed or otherwise harmed Allied nationals and British servicemen in particular.[198] Despite British unwillingness to try industrialists,[199] in a 'minor, insignificant' case,[200] Tesch and his colleagues, the suppliers of Zyklon B produced by Farben to the death camps, were tried. Two were sentenced to death, while a third defendant was later pardoned by Prime Minister Eden.[201] The Brits also tried Professor Wittig of the Steinöl company, which had benefitted from camp labour supplied through Pohl's office. While the Neuengamme camp inmates consisted almost entirely of Allied nationals and POWs, Wittig escaped a death sentence.[202] The British appeared to have tried these businessmen not as members of their class or professional group, but conversely, as part of a series of scapegoats for harm to British national interest. The war crimes trials were unpopular with the

[192] Bloxham, above n 73, 24.
[193] *The Government Commissioner of the General Tribunal of the Military Government of the French Zone of Occupation in Germany v Hermann Roechling et al* (*Roechling*) *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, Vol. XIV 1062.
[194] *Roechling*, 1062.
[195] Under CCL10 each occupying authority was entitled to set its own rules of procedure for military trials. The French—unlike the Americans—allowed defendants to appeal against conviction.
[196] *Roechling*, above n 193, 1109–10.
[197] *Roechling*, 1142–3.
[198] Bloxham, above n 73, 106.
[199] Bush, above n 1, 1134.
[200] *In re Tesch & Others* (*Zyklon B Case*), British Mil. Ct. 1946, in 1 UN War Crimes Comm'n, *Law Reports of Trials of War Criminals*, 93 (1947).
[201] UK National Archives, File No. WO 235/283.
[202] UK National Archives, File No. WO 235/283.

British establishment, for several reasons including widespread anti-semitic and anti-communist attitudes among the UK leadership.[203]

For the Soviets, the zonal trials appeared to be about *Systemkritik*, or an opportunity to publicly condemn capitalism (as the cause/source of fascism) and its amoral agents. Among the estimated 70,000–72,000 persons tried by the Soviets under CCL10[204] were the directors and functionaries of Töpf & Sohne, who supplied ovens to Auschwitz and were sent to perform hard labour.[205]

Lawyers like Dubois and Sasuly, and to a lesser extent Taylor, left Germany frustrated and enraged.[206] On coming home, the case they had been fighting was now taboo. The tables had turned, the capitalists emerged as victors and the prosecutors became persecuted. Tellingly, Kuehne, in his final statement to the *Farben* Tribunal, cited the *New York Herald Tribune* of 4 October 1947, from a report on a speech held by the Secretary of Defence, Forrestal, as follows: 'Mr. Forrestal denied that there was any historical validity for the Marxist theory according to which industrialists desired war for the sake of material gains. Mr. Forrestal said that there was no group anywhere that was more in favour of peace than the industrialists'.[207]

The point on which the Allies had agreed before, and at the IMT, was now a 'Marxist theory'.[208] On their return to the US, several members of the American prosecution team and OMGUS staff were investigated for possible 'bolshevist' sympathies by McCarthy's regime.[209] The preface to the German edition of Sasuly's book, states that this text, for political reasons, has not been available in the US for many years.[210] The legacy of this has been the 'legal amnesia' through which the industrialists' trials were forgotten until relatively recently.[211]

On 21 September 1949 John McCloy replaced General Clay as civilian supervisor (High Commissioner) of what was now the Federal Republic of West Germany. By September 1950, the US was at war with Korea. McCloy and Acheson strongly advocated that West Germany be rearmed.[212] According to Maguire, '[o]nce it became

[203] A. Rogers, 'War Crimes Trials Under the Royal Warrant: British Practice, 1945–1949', *ICLQ*, *39* (1990), 780–800.

[204] A. Hilger, 'Die Gerechtigkeit nehme ihren Lauf? Die Bestrafung deutscher Kriegs- und Gewaltverbrecher in der Sowjetunion und der SBZ/DDR', in N. Frei (ed), *Transnationale Vergangenheitspolitik: Der Umgang mit deutschen Kriegsverbrechern in Europa nach dem Zweiten Weltkrieg* (Gottingen: Wallstein Verlag, 2006), 191.

[205] 'Protokolle des Todes', 'Verhörprotokolle der Auschwitz-Ingenieure Prüfer, Sander und Schultze', *Der Spiegel*, 47:40 (1993), 151–62, <http://www.spiegel.de/spiegel/print/d-13679718.html> (accessed 27 February 2013) and <http://www.spiegel.de/spiegel/print/d-13679727.html> (accessed 27 February 2013). See also generally Hilger, above n 204. Hilger argues that the release of German prisoners in 1953–6 signified a breach with the Stalinist policy of collective punishment for Germany's 'unjust war' (at 245).

[206] This is evident in the tone and content of their post-war writing: Dubois, above n 8; Taylor, above n 156; Sasuly, above n 104.

[207] *Farben*, above n 123, 1073 (Final Statements of Defendants: Keuhne).

[208] US Senator William Langer called the industrialist cases part of a communist plot (Maguire, above n 75, 169).

[209] See, eg, Bush, above n 1, 1232; Interview with Bernard Bernstein, above n 84. See also a letter by Telford Taylor to Philip Young (successor to McCarthy) demanding a note on Taylor's file flagging 'unresolved question of loyalty': Letter from Telford Taylor to Philip Young, 'Telford Taylor Papers', Arthur W. Diamond Law Library, Columbia University Law School, New York, NY, TTP-CLS: 10-0-3-45.

[210] Sasuly, above n 104, 5.

[211] Bush, above n 1, 1240.

[212] Maguire, above n 75, 167–9.

official that West Germany would be rearmed, questions pertaining to the war criminals took on new significance as West German leaders from all political parties pointed to America's paradoxical role as occupying ally'.[213] German industrialists united in reconstituted trade associations again began to exert their influence, including for the release of their colleagues.[214] US and German leaderships shaped two American policies vis-à-vis the war crimes convicts: a public one to defend the validity of convictions from German attack, and a private one aimed at releasing war criminals as quickly and quietly as possible.[215] On 31 January 1951 clemency boards constituted by McCloy carried out 'extrajudicial' re-reviews of sentences handed down by the Allied occupation courts.[216] McCloy commuted twenty-one death sentences, reduced the sentences of sixty-nine other individuals and released thirty-three other war criminals, including Alfried Krupp. The *Flick* and *Farben* defendants had already been released or had completed their sentences by this point.[217] This review greatly upset Taylor, who wrote to Eleanor Roosevelt in protest. Among the main problems Taylor found was that the clemency board based its decision on a reading of the judgments and hearing of fifty defence lawyers but not a review of the evidence nor hearing anyone from the prosecution.[218] Moreover, the authority (or legality) of the reviews per se was questioned.[219] Similarly in the UK, 'immediately on his return to Downing Street [in 1951] Churchill moved to release all remaining Germans'.[220] Wittig was released in 1955.[221] The early releases are criticized as completely discrediting the original trials[222] and 'confirm[ing] the failure of Nuremberg'.[223] Jeßberger writes (specifically about the IG Farben managers—but this could apply to the industrialists in general), '[the industrialists] had a soft fall, from the ranks of the Wehrmacht into the warm bosom of the Western powers'.[224]

So, while '[t]he masses of peoples liberated from the yoke of fascism demanded the trial of the most evil cartel leaders, in Nuremberg',[225] even those who had received sentences were soon to be freed again, and by 1952 many were already

[213] Maguire, above n 75, 168.
[214] Schanetzky, above n 30, 80.
[215] Maguire, above n 75, 162.
[216] 'Landsberg: A Documentary Report', *Information Bulletin*, Office of the US High Commissioner for Germany Office of Public Affairs, Public Relations Division, APO 757, US Army, February 1951, 2–8, 55–67.
[217] 'Landsberg: A Documentary Report', above n 216, 6. For Clay's original review and confirmation, see *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, Vol. XV, 1144–5; Taylor, Final Report, above n 109, 95–7; Heller, above n 22, 332.
[218] Letter to Eleanor Roosevelt dated 19 June 1951, 'Telford Taylor Papers', Arthur W. Diamond Law Library, Columbia University Law School, New York, NY, TTP-CLS: 14-4-3-53 (Taylor Letter to Roosevelt).
[219] Heller, above n 22, 356–8.
[220] Bloxham, above n 73, 116.
[221] UK National Archives, WO 235/283.
[222] Taylor Letter to Roosevelt, above n 218.
[223] Maguire, above n 75, 178. 'Instead of discussing the shocking atrocities committed by many of the high-ranking convicts, American officials were forced to defend the basic legal legitimacy of the trials': at 207.
[224] Jeßberger, 'On the Origins of Individual Criminal Responsibility' above n 1, 802.
[225] IG Farben: Mächtiger und Gefährlicher denn je, Institut für Marxismus-Leninismus and der Technischen Hochschule für Chemie Leuna-Merseburg, 1960.

back in power at their companies.[226] Indeed, the IG Farben 'parts' BASF, Bayer, and Hoechst quickly became leading companies in their sector.[227] These soon began to produce military materials again which were used by the US in their war against Korea.[228] Further, former manufacturer of German military uniforms Neckermann became a fashion mail-order giant, symbolizing the rising consumer culture, while the former Reich ambassador to Italy became CEO of the Coca Cola Germany, a symbol of US–German reconciliation.[229] While German industry was rebuilt, the Cold War deepened, the UN, the European Coal and Steel Community, the General Agreement on Tariffs and Trade regime and the Bretton Woods institutions took shape.[230] From this perspective, Nuremberg was not a failure. Rather, by producing capitalism's victor's justice it played an important part in this process of further congealing capitalism and institutionalizing international law.[231]

(VI) Conclusion

A qualitative change came out of the contradictions of Nuremberg: the way in which the war was understood had altered. The 'economic case' all but disappeared from the mainstream narrative of WWII, which today focuses almost entirely on what Frei calls the 'Hitler-factor'.[232] The 'economic case', once central to the Nuremberg prosecution, while persisting in the German Democratic Republic and Soviet literature, is now described as propaganda by Western scholars.[233]

International criminal law was born out of the great contradictions that existed in the aftermath of WWII. Its potential as a powerful way of shaping narratives—highlighting some relations and 'spiriting away' others; concealing what must remain hidden—was soon realized. Through Nuremberg, international criminal law as 'commodified morality'[234] helped spirit away the material causes at the base of WWII. At the same time, something fundamental had changed on the ground in Europe, where economic actors came to be seen as essentially peaceful, and where economic development became synonymous with peace.[235] Combined, these two moves cemented capitalism's victor's justice, functioning as a means of

[226] Along with almost all other members of 'Hitler's elite': Norbert Frei (ed), *Hitlers Eliten nach 1945* (Munich: Deutscher Taschenbuch Verlag, 2003), esp. T. Schanetzky, 'Unternehmer: Profiteure des Unrechts' (at 87).
[227] Schanetzky, above n 30, 87.
[228] IG Farben: Macht und Verbrechen: Ein auf exaktem Material beruhender Beitrag zur nationalen Frage in Deutschland un dem Weg zu ihrer Lösung, Institut für Marxismus-Leninismus and der Technischen Hochschule für Chemie Leuna-Merseburg, 1962.
[229] Schanetzky, above n 30, 88.
[230] In an ironic turn, McCloy was appointed to lead the World Bank (Bush, above n 1, 1193).
[231] Grietje Baars, 'The Making of an International Criminal Law', in Christine Schwöbel (ed.) *Critical Approaches to International Criminal Law: An Introduction*, (Oxford: Routledge, forthcoming, 2014).
[232] Generally, Frei, above n 18.
[233] Frei, above n 18, front inside jacket and 10; Osterloh, above n 20, 37.
[234] Baars, above n 125.
[235] See, for example, Thomas Friedman's 'Golden Arches Theory of Conflict Prevention', in *The Lexus and The Olive Tree* (New York, NY: Anchor Books, 2000).

creating a narrative that hides the economic story of conflict, and constructs what we would now call corporate impunity.

Post-Cold War and the global spread of capitalism, renewed impetus for international cooperation in the sphere of international criminal law, has not led to the application of that law to war's economic actors. Instead, international criminal law continues to draw our focus to individual deviancy rather than conflict produced by the mode of production, hiding economic grounds behind nationalist, racial, religious, etc explanations.[236] Elsewhere I have employed Pashukanis' 'commodity form theory of law'[237] to argue that law's function reaches beyond mere capitalist instrumentalism and is, by virtue of its form, an essential element of the capitalist mode of production.[238] Thus, rather than suggesting 'corporate accountability in ICL' is a real possibility,[239] the hidden history of Nuremberg may give us cause to investigate more deeply exactly how and why international criminal law constructs *de facto* 'corporate impunity' as a necessary ingredient of today's capitalist imperialism.

[236] For a discussion of this effect in the context of the International Criminal Tribunal for Yugoslavia, and Rwanda see Baars, above n 125, 255–85. Bukharin also makes this point: Bukharin, above n 3, 117–18: '[The theory that war comes out of "the struggle of races"] is assiduously cultivated both in the press and in the universities, for the sole reason that it promises no mean advantages for Master Capital': at 118.

[237] Pashukanis, above n 2, and China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (London: Pluto Press, 2006).

[238] Baars, above n 125; Grietje Baars, 'Reform or Revolution?' Polanyian v Marxian Perspectives on the Regulation of "The Economic" ', *Northern Ireland Law Quarterly*, *62* (2011), 415–31.

[239] As some contemporary authors on Nuremberg do, see, for example, Bush, above n 1.

9

Eisentrager's (Forgotten) Merits: Military Jurisdiction and Collateral Habeas

*Stephen I. Vladeck**

No pre-September 11 decision by the US Supreme Court has figured more prominently in contemporary debates over the extraterritorial scope of the US Constitution than the Court's 1950 ruling in *Johnson v Eisentrager*.[1] Although *Eisentrager* has been vigorously debated, its *result* is undisputed: twenty-seven German nationals[2] captured in China were tried by a US military commission for war crimes based on their continuing participation in hostilities in support of the Japanese military after Germany's 8 May 1945 surrender (and before Japan's surrender on 15 August).[3] Twenty-one of the defendants were convicted by the commission and sentenced to prison terms ranging from five years' to life imprisonment.[4] After being transferred back to Germany to serve their sentences, the twenty-one convicted defendants sought habeas relief in the US courts, only to have the Supreme Court ultimately reject their claims by a six to three vote.[5]

The difficulty arises in ascertaining *how* the Supreme Court reached that result. In his 1990 opinion in *United States v Verdugo-Urquidez*,[6] Chief Justice Rehnquist described *Eisentrager* as 'reject[ing] the claim that aliens are entitled

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[1] *Johnson v Eisentrager*, 339 US 763 (1950).

[2] The defendants were Lothar Eisentrager (also known as Ludwig Ehrhardt), Franz Siebert, Herbert Gleitsch, Johannes Otto, Erich Heise, Oswald Ulbricht, Hanz Niemann, Ingward Rudloff, Bodo Habenicht, Hans Dethleffs, Wolf Schenke, Heinz Peerschke, Hans Mesberg, Johannes Rathje, Siegfried Fuellkrug, Walther Heissig, Jesco von Puttkamer, Alfred Romain, Ernst Woermann, Wilhelm Stoller, Elgar von Randow, Walter Richter, Hermann Jaeger, Felix Altenburg, Herbert Mueller, August Stock, and Maria Muller.

[3] The facts in this chapter are derived from three primary sources: (1) the Supreme Court's opinion in *Eisentrager*, see 339 US 765–8; (2) the Transcript of Record therein, see Transcript of Record, *Johnson v Eisentrager*, 339 US 763 (1950) (No. 306); and (3) the report on the *Eisentrager* commission proceedings in Volume 14 of the United Nations War Crimes Commission's multivolume set on the *Law Reports of Trials of War Criminals*, see xiv UN War Crimes Commission, *Law Reports of Trials of War Criminals* 8–22 (1949) (LRTWC). To avoid redundancy, I cite to specific sources only when quoting from them directly.

[4] Glietsch, Otto, Randow, Schenke, Steller, and Woermann, were acquitted, leaving twenty-one defendants who ultimately petitioned for writs of habeas corpus in the US courts.

[5] See *Eisentrager*, 339 US 763.

[6] 494 US 259 (1990).

to Fifth Amendment rights outside the sovereign territory of the United States'.[7] Relying on that passage, a number of contemporary US courts and commentators routinely cite *Eisentrager* for the proposition that non-citizens detained outside the territorial United States have no rights under the Due Process Clause of the Fifth Amendment.[8] In a similar vein, still others have described *Eisentrager* as holding that the US Constitution's Suspension Clause, which protects a detainee's access to judicial review via writs of habeas corpus, does not apply to the extraterritorial detention of non-citizens.[9] Thus, one of the most common criticisms of the Supreme Court's 2008 decision in *Boumediene v Bush*, which held that the Suspension Clause 'has full effect' with regard to the detention of non-citizens at Guantánamo Bay,[10] is a lack of fealty to *Eisentrager*.[11]

And yet, as then-Solicitor-General Paul Clement so succinctly put it during the oral argument before the Supreme Court in *Hamdan v Rumsfeld*,[12] *Eisentrager* is a case with 'an awful lot of alternative holdings'.[13] Although the majority opinion was authored by Justice Robert H. Jackson—routinely hailed as one of the Court's greatest writers—its analysis comes off as disjointed, if not internally inconsistent.[14] Indeed, whatever else one may say about the majority opinion in *Eisentrager*, it seems difficult to read the decision as articulating a categorical rule concerning the extraterritorial constitutional rights of non-citizens in light of the careful and repeated attention that the Court paid to the specific circumstances of the case.[15]

But why did those circumstances matter? In this chapter, I aim to answer that question—and to explain why *Eisentrager* has been so unclear to contemporary readers—by focusing on the one source almost completely neglected by present-day discussions of the 1950 Supreme Court decision: the underlying military commission proceedings.[16] Indeed, for as much attention as *Eisentrager* has received, surprisingly little attention has been paid to the war crimes trial from which the litigation arose—even though at least some records of the proceedings are

[7] *Verdugo-Urquidez*, above n 6, 269 ('[T]he Court held that enemy aliens arrested in China and imprisoned in Germany after World War II could not obtain writs of habeas corpus in our federal courts on the ground that their convictions for war crimes had violated the Fifth Amendment and other constitutional provisions.').

[8] See, eg, *United States v Ali*, 71 MJ 256, 267–268 (CAAF, 2012); *Rasul v Myers*, 563 F 3d 527, 529 (DC Cir, 2009) (*per curiam*); J. Andrew Kent, 'A Textual and Historical Case Against a Global Constitution', *Georgetown Law Journal*, *95* (2007), 474.

[9] See, eg, *Ibrahim v Dep't of Homeland Sec.*, 669 F 3d 983, 995 (9th Cir, 2012).

[10] 553 US 723, 771 (2008).

[11] See, eg, ibid, 834–42 (Scalia, J., dissenting).

[12] *Hamdan v Rumsfeld*, 548 US 557 (2006).

[13] Transcript of Oral Argument 72, Hamdan, 548 US 557 (No. 05-184) (statement of Solicitor General Paul Clement), <http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-184.pdf> (link directs to Supreme Court website, accessed 28 February 2013).

[14] See, eg, Stephen I. Vladeck, 'The Problem of Jurisdictional Non-Precedent', *Tulsa Law Review*, *44* (2009), 595–600.

[15] See, eg, *Johnson v Eisentrager*, 339 US 763, 785–90 (1950).

[16] Indeed, contemporary commentators routinely ignore the fact that the habeas petitioners before the Supreme Court had already been convicted by a military commission, which dramatically changes the circumstances of their case from those of individuals held without charges. See, eg, *Rasul v Bush*, 542 US 466, 475–7 (2004) (articulating some of the key differences between *Eisentrager* and the Guantánamo habeas litigation).

easily accessible; and even though, as I explain in the pages that follow, a full appreciation of the proceedings sheds significant light on Justice Jackson's analytical approach.

Thus, Section I begins by providing a detailed overview of the *Eisentrager* military commission. As Section I explains, the central contention made by the petitioners in *Eisentrager* was not that they had been deprived of constitutional rights during their military commission trial; rather, their claim was that, for various reasons, the commission lacked jurisdiction to try them.[17] Indeed, even in front of the commission itself, the defendants' 'main argument', as the official report on the proceedings later summarized,[18] challenged the tribunal's power to try them, and not whether the defendants in fact had supported Japanese forces in China subsequent to Germany's 8 May surrender. No arguments were made at any point in the commission concerning the defendants' constitutional rights; that issue only arose once the DC Circuit rested its jurisdiction to *reach* the merits on its view of the defendants' constitutional entitlement to judicial review.[19]

The significance of the *Eisentrager* defendants' jurisdictional argument becomes clearer in Section II, which turns to the jurisprudential background against which *Eisentrager* was decided. Indeed, in 1950, it was black-letter law that the only claim US federal courts could adjudicate in a collateral attack upon a conviction by a military court was whether the military had properly exercised jurisdiction—regardless of whether the defendant was a citizen or a foreign national, or whether the military trial took place within or without the territorial United States.[20] As Chief Justice Stone wrote for the Court in 1946 in *In re Yamashita*:

> [O]n application for habeas corpus we are not concerned with the guilt or innocence of the petitioners. We consider here only the lawful power of the commission to try the petitioner for the offence charged. In the present cases it must be recognised throughout that the military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court. They are tribunals whose determinations are reviewable by the military authorities either as provided in the military orders constituting such tribunals or as provided by the Articles of War. Congress conferred on the courts no power to review their determinations save only as it has granted judicial power 'to grant writs of habeas corpus for the purpose of an inquiry into the cause of the restraint of liberty'. The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner. If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorised to review their decisions.[21]

[17] See, eg, Brief in Opposition to Petition for Writ of Certiorari 1-4, *Eisentrager*, 339 US 763 (No. 306).

[18] XIV LRTWC, above n 3, 15.

[19] See *Eisentrager v Forrestal*, 174 F 2d 961 (DC Cir, 1949).

[20] See, eg, *Hiatt v Brown*, 339 US 103, 111 (1950) ('It is well settled that by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial ... The single inquiry, the test, is jurisdiction.' (omission in original; internal quotation marks omitted)).

[21] 327 US 1, 8 (1946) (citations omitted). This model of review stands in contrast to the model that Congress pursued in the Military Commissions Acts of 2006 and 2009, which provide for direct appellate review of military commissions in an intermediate military court (the 'Court of Military Commission Review'), followed by the US Court of Appeals for the D.C. Circuit and, potentially, the US Supreme Court. See 10 USC §§ 950f, 950g.

Three years after *Eisentrager*, the Court expanded the scope of habeas review of courts-martial in *Burns v Wilson*,[22] a holding that likely applies as well to collateral review of military commissions.[23] But at least at the time that *Eisentrager* was decided, the only question that the federal courts had the power to adjudicate was whether the military commission properly exercised jurisdiction.

Section III turns to the proceedings before the Supreme Court in *Eisentrager* in light of the factual background provided in Section I and the legal background provided in Section II. Although there are any number of statements in Justice Jackson's majority opinion that, out of context, may well support the broad view of *Eisentrager* embraced by Chief Justice Rehnquist in *Verdugo-Urquidez* and popular among numerous contemporary commentators, the Court's focus on the commission's 'jurisdiction' in Parts III and IV of the majority opinion drives home the crucial point—that *Eisentrager* was ultimately a merits decision, that is, a holding by the Court that the commission that convicted the petitioners properly exercised jurisdiction.[24] Because of that conclusion, the petitioners' entitlement to due process and/or habeas corpus was moot; there was nothing more for the federal courts to do.

Ultimately, then, *Eisentrager*'s history is hiding in plain sight in the nature of the arguments made by the military commission defendants. And that hidden history provides a far more convincing and compelling explanation for the Supreme Court's disposition of the defendants' claims—and for an exceedingly limited view of the 1950 decision's future doctrinal relevance.

(I) *United States v Eisentrager* et al

The only truly unusual aspect of the military commission proceedings in *United States v Eisentrager* was the nature of the charges. Although the US government convened hundreds of military commissions to try Axis war criminals after the end of World War II, the *Eisentrager* proceedings were, from the start, unique. Indeed, the factual idiosyncrasies may help to explain why, of all the post-war US military commission proceedings, *Eisentrager* would be one of only two that drew the attention of the US Supreme Court.

(1) Factual background

At the heart of the prosecution's case in *Eisentrager* was the role of the 'Bureau Ehrhardt', which the US government claimed was a 'unit of the German High Command', and which the defendants claimed was a civilian agency of the

[22] 346 US 137 (1953) (plurality opinion).

[23] The issue has never formally arisen, but the Supreme Court has consistently treated the scope of collateral review of military commissions as following the same for courts-martial. See, eg, *Yamashita*, 327 US 8.

[24] *Johnson v Eisentrager*, 339 US 763, 781–90 (1950).

German government. Whether de facto or de jure, it was undisputed that Bureau Ehrhardt was an intelligence agency run by Ludwig Ehrhardt—also known as Lothar Eisentrager—who himself was employed by the German Embassy in Japanese-occupied China during the war. Through a combination of official and unofficial channels, Bureau Ehrhardt effectively served as the intelligence and propaganda apparatus for German interests in China throughout the hostilities in Asia. And although some of the twenty-seven defendants were not directly employed by the Bureau, all were allegedly involved in its operations in some way.

The central claim that gave rise to the *Eisentrager* war crimes trial was the allegation that, after Germany's unconditional surrender on 8 May 1945, Bureau Ehrhardt continued to operate in Shanghai, Canton (present-day Guangzhou), and Peking (Beijing), by furnishing various forms of aid (including the facilitation of Japanese access to German-owned materiel) and military intelligence directly to Japanese armed forces stationed in China. Indeed, the government introduced a telegram Ehrhardt/Eisentrager sent to all of his subordinates on 8 May 1945, which specifically provided:

(1) that the organization ceased to exist and its members were to be demobilized;
(2) that equipment should be turned over to Japanese authorities who were to be instructed how to use it; and
(3) that the question of continuing work in cooperation with the Japanese was left to the discretion of every individual member of the organization.[25]

Although Erhardt argued that the telegram was meant to be taken at face value (and, as such, proved that the Bureau had formally demobilized), the government introduced substantial evidence proving that the Bureau's employees took it to mean exactly the opposite—that 'the telegram was so worded as to suggest that co-operation with the Japanese was desirable, or even ordered'.[26] The government also introduced evidence of a series of ongoing contacts between Bureau employees and the Japanese military, which apparently sought only to expand the role that the Bureau played both in providing intelligence to support Japanese manoeuvres in China throughout June and July 1945 and in designing propaganda intended to reach US troops engaged with Japanese forces throughout the Pacific Rim. To that end, the government proffered a single charge against all twenty-seven defendants—that they:

> [k]nowingly, wilfully and unlawfully, violate[d] the unconditional German surrender by engaging in and continuing military activity against the United States and its allies, to wit by furnishing, ordering, authorising, permitting and failing to stop the furnishing of aid, assistance, information, advice, intelligence, propaganda and material to the Japanese armed forces and agencies, thereby by such acts of treachery assisting Japan in waging war against the United States of American in violation of the laws and customs of war.[27]

[25] XIV LRTWC, above n 3, 11. [26] XIV LRTWC, above n 3, 11.
[27] Transcript of Record 25–6, *Johnson v Eisentrager*, 339 US 763 (1950) (No. 306).

The defendants were taken into custody by US forces sometime after the Japanese surrender in China in September 1945. In January 1946, the US military issued an order creating military commissions to try war criminals captured in the Chinese theatre for offences committed therein. The trial in *Eisentrager* itself took place in Nanking between 3 October 1946, and 14 January 1947. Other than the dispute over whether they acted independently or under continued coordination, the defendants did not materially contest the factual allegations. Instead, they offered three distinct sets of defences—one jurisdictional, and two on the merits.

The jurisdictional objection was three-fold. First, the defendants argued that, as German nationals living in China, they could only be subject to German or Chinese law in German or Chinese courts. Second, and relatedly, the defendants argued that the 1943 abrogation by treaty of the US Court for China deprived the United States of any alternative basis to assert jurisdiction over the defendants. Finally, the defendants claimed that the agreement between the United States and China on which the military commission's jurisdiction was predicated was irrelevant, both because (1) it was never ratified by the Legislative Assembly of the Republic of China; and (2) the authority it conveyed could only be exercised by an 'occupation' force, and not by an expeditionary force on allied soil (as the United States military necessarily was once Japan surrendered to China).

On the merits, the defendants also offered three arguments in favour of a motion to dismiss the charges. First, the defendants claimed that the charges did not state sufficient facts to support a violation of the laws of war. Second, and related, the defendants argued that even if the charges were factually sufficient, 'a violation of certain terms by individuals although punishable, does not constitute a war crime unless the acts constituting the violation thereof are such as in themselves constitute a violation of the laws and customs of war'. In other words, even if defendants violated the surrender, that by itself was not enough to render them subject to trial by military commission. Finally, the defendants attacked the charges for failing to allege that the defendants had received 'official' notice of Germany's 8 May surrender, even though they conceded that they had actual notice.

(2) The Commission's rulings

The jurisdictional argument to which the commission devoted the most attention was the first one—that the defendants could only be subjected to German or Chinese law for crimes committed on Chinese soil. Relying on the earlier military commission decision in the *Sawada* case, the *Eisentrager* commission ruled that '[t]he laws and usages of war are of universal application, and do not depend for their existence upon national laws and frontiers'.[28] This conclusion proved dispositive of the defendants' two other jurisdictional challenges; from the commission's perspective, it followed that, once the Chinese government invited US forces onto Chinese soil, that invitation rendered beside the point whatever constraints would

[28] XIV LRTWC, above n 3, 15.

otherwise have existed on the US government's power over the defendants. Relying heavily on the US Supreme Court's holding in the *Yamashita* case that prosecuting war criminals is an inherent incident to the war power more generally, the commission thereby dismissed the jurisdictional objections.

As for the defendants' claims on the merits, the heart of their legal argument went to the contention that violating the terms of Germany's surrender was not a war crime. In responding to this contention, the commission's analysis appears to have rested on a series of interrelated conclusions. First, the 8 May 1945 Act of Military Surrender was explicit and unambiguous in its applicability in 'all theatres of war' against forces of the 'United Nations'. Second, the conduct Bureau Ehrhardt allegedly engaged in subsequent to the 8 May surrender appeared to fall within the scope of the Act of Military Surrender's definition of hostilities, Article 9 of which provided that '[p]ending the institution of control by the Allied Representative over all means of communication, all radio and telecommunication installations and other forms of wire or wireless communications, whether ashore or afloat, under German control, will cease transmission except as directed by the Allied Representatives'.[29]

Third, both custom and usage supported the conclusion that post-surrender hostilities constituted a war crime when such hostilities were committed by assisting the forces of an allied belligerent who had not yet surrendered. Thus, the official report of the commission invoked Articles 40 and 41 of the 1907 Hague Convention; the then-leading international law treatise; and the decision in the *Scuttled U-Boat Case*, in which a lieutenant in the German navy was convicted of violating the Act of Military Surrender by scuttling a pair of U-Boats rather than surrendering them to the Allies.[30] As the reporter summarized, the defendants tried to distinguish that precedent by suggesting that hostilities were ongoing in the Pacific theatre, and so, unlike the defendant in *Scuttled U-Boat*, they had a 'perfect right' to join forces with the Japanese (who had not participated in the European theatre). The commission rejected the argument, and its decision was subsequently read as establishing that:

> members of the armed forces of a belligerent whose entire armed forces have surrendered must abstain from all hostilities wherever they may find themselves on the date of such surrender[,] and that by co-operating with an allied belligerent and *a fortiori* by joining the forces of such belligerent, they violate the terms of surrender and thus commit a war crime.[31]

Fourth, and finally, the commission rejected the argument that some of the defendants were not bound by the surrender because they were civilian employees of the German government, and therefore not within the military chain of command. Indeed, given that some of the defendants were convicted despite the fact that they were not formally part of the Bureau Ehrhardt, the commission's

[29] XIV LRTWC, above n 3, 19–20.
[30] See XIV LRTWC, above n 3, 18–20; see also Trial of Oberleutenant Gerhard Grumpelt (The Scuttled U-Boats Case) (Brit. Mil. Ct. 1946), I LRTWC, above n 3, 55, 56.
[31] XIV LRTWC, above n 3, 21.

decision established that 'the terms of surrender applied to all nationals of the surrendering belligerent and not only to the armed forces'.[32] Since 'all such nationals must … refrain from activities which are either considered to be military activities or contrary to the terms of surrender',[33] the only remaining question was whether the prosecution could establish that each of the defendants had in fact engaged in such conduct between 8 May and 15 August 1945. Presumably, in the cases of the six defendants who were acquitted at the close of the prosecution's case-in-chief (Glietsch, Otto, Randow, Schenke, Steller, and Woermann), the government was not able to adduce sufficient proof. The other twenty-one defendants were found guilty at the close of the defence case.

Although Ehrhardt/Eisentrager himself was sentenced to life imprisonment, the other twenty defendants were sentenced to prison terms ranging from five to thirty years. After their convictions, the twenty-one defendants were transferred to Landsberg Prison in Germany to serve their sentences. Three of the sentences were subsequently reduced by the Reviewing Authority, Major General John P. Lucas, who confirmed the remaining judgments on 10 May 1947.[34] Less than one year later, habeas petitions were filed on behalf of the twenty-one convicted defendants in the US District Court for the District of Columbia by A. Frank Reel, the same Boston lawyer who had defended General Yamashita before a US military commission in 1945, and then unsuccessfully appealed his conviction to the Supreme Court.[35]

(3) Habeas proceedings in the lower courts

The habeas petition in *Eisentrager v Forrestal* was filed in the DC District Court on 26 April 1948 against a rather complex (and evolving) jurisprudential backdrop. For obvious reasons, the US federal courts had begun to receive a number of habeas petitions from individuals held overseas beginning in early 1946.[36] Although the first cases involved US soldiers challenging their courts-martial for abuses committed while serving abroad, convicted German and Japanese war criminals began to seek relief in the US courts as early as October 1947—when Field Marshal Erhard Milch sought to challenge his conviction by the Nuremberg Military Tribunal (NMT) in the US Supreme Court. The Justices denied review by a four to four vote (Justice Jackson, the lead US prosecutor before the International Military Tribunal, understandably recused),[37] at least largely because it was unclear whether the Supreme Court had the power to entertain such an 'original' action.[38]

[32] XIV LRTWC, above n 3, 21. [33] XIV LRTWC, above n 3, 21–2.

[34] See Transcript of Record 42–3, *Johnson v Eisentrager*, 339 US 763 (1950) (No. 306).

[35] See *In re Yamashita*, 327 US 1 (1946); see also A. Frank Reel, *The Case of General Yamashita* (Chicago: University of Chicago Press, 1949).

[36] For discussions of this litigation, see Charles Fairman, 'Some New Problems of the Constitution Following the Flag', *Stanford Law Review*, *1* (1949), 587; and Stephen I. Vladeck, 'Deconstructing Hirota: Habeas Corpus, Citizenship, and Article III', *Georgetown Law Journal*, *95* (2007), 1497.

[37] See *Milch v United States*, 332 US 789 (1947) (memorandum).

[38] The US Constitution limits the Supreme Court's 'original' jurisdiction to a small class of cases, which generally do not include habeas petitions brought by US detainees. Technically, those limits are not implicated when the Supreme Court is at least functionally asked to review the decision of a

If the claims could not be brought directly in the Supreme Court, the next candidate would be to file in the lower federal courts, and then potentially appeal an unfavourable decision to the Justices (who would have had statutory appellate jurisdiction in such cases). But on 21 June 1948, at almost the exact same time as the *Eisentrager* petitioners filed their suit, the Supreme Court created a new jurisdictional obstacle. Specifically, the Court held in *Ahrens v Clark* that the federal habeas corpus statute only authorized jurisdiction in a detainee's 'district of confinement'.[39] While such a rule served merely as a choice-of-venue provision for individuals detained *within* the United States, it necessarily raised the question of whether district courts could not thereby exercise statutory jurisdiction over habeas petitions brought by individuals detained outside the territorial jurisdiction of *any* district court, such as the petitioners in *Eisentrager*. And although the Justices in *Ahrens* were clearly aware of the pending war crimes cases, they expressly punted on this question, noting only that '[w]e need not determine the question of what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert federal rights'.[40]

Whereas *Ahrens* may have purported to leave the question open, analysis by contemporaneous (and future) commentators suggested that its reasoning compelled the same answer. As Professor Charles Fairman put it in the *Stanford Law Review*, 'if the statute makes the presence of the petitioner a requisite to jurisdiction, how can it make any difference whether the detention is in no district rather than a different district?'[41] Unfortunately, in ruling on the *Eisentrager* habeas petition, Judge Edward Tamm did not even reach that question, incorrectly concluding instead that '[t]he facts at issue were directly raised before the Supreme Court' in *Ahrens*, and that 'the Supreme Court has specifically passed upon the question of law presented to this Court'.[42] Although the Supreme Court had done no such thing, Judge Tamm's ruling thereby provoked an unnecessary constitutional question: Does the Constitution itself require access to a habeas remedy for all individuals in US custody, such that courts must act even in the absence of statutory jurisdiction?

Rather than reverse the district court for misreading *Ahrens* (as it quite clearly had), the DC Circuit on appeal reached out to decide the constitutional question. As Judge E. Barrett Prettyman wrote for a unanimous three-judge panel:

> The question here is not whether a court, either state or federal, can exercise its judicial power within the jurisdiction of another and independent government. The question is whether it can exercise that power upon those Government officials within its territorial jurisdiction who have directive power over the immediate jailer outside the United States but acting solely upon authority of this Government. We think that it can, if that be the only means of applying the Constitution to a given governmental action.[43]

'lower' court, but it hardly followed that the tribunals at issue in these cases were examples of such. See generally Vladeck, above n 36.

[39] 335 US 188 (1948). [40] 335 US 188 (1948), 192, n 4. [41] Fairman, above n 36, 632.

[42] *Eisentrager v Forrestal*, unpublished opinion (DDC, Oct 6 1948), reprinted in Transcript of Record 16–17, *Johnson v Eisentrager*, 339 US 763 (1950) (No. 306).

[43] *Eisentrager v Forrestal*, 174 F 2d 961, 967 (DC Cir, 1949) (footnotes omitted).

Thus, the Court of Appeals held that the Suspension Clause of the US Constitution required the court to read the habeas statute as *not* foreclosing jurisdiction—that, in effect, the Suspension Clause protected access to the US courts for *all* individuals in US custody anywhere in the world. Decided in April 1949, at a time when the US military continued to detain hundreds of thousands of enemy soldiers around the world, it is little surprise that the Truman Administration expeditiously sought review from the US Supreme Court.

(II) The US Supreme Court and the Scope of Collateral Habeas

The sweeping rhetoric of the DC Circuit's analysis helped obfuscate the narrowness of the detainees' substantive claim on the merits—that the US military commission that convicted them was without jurisdiction to try them. That nuance is critical, given that *Eisentrager* reached the Supreme Court just as the Justices were in the midst of dramatically expanding the scope of collateral review of criminal convictions in other contexts (and debating the proper scope of collateral review of military courts).[44] Thus, to understand why the 'jurisdictional' nature of the challenge in *Eisentrager* was so central, this section provides a broader introduction to the Supreme Court's evolving approach to the scope of collateral review—and where things stood on 14 November 1949, when the Justices accepted the government's appeal of the DC Circuit's decision in *Eisentrager*.[45]

(1) Collateral review of state court convictions

Since at least the Habeas Corpus Act of 1867, if not before, the federal courts unquestionably had statutory jurisdiction to entertain habeas petitions by individuals in custody pursuant to a *state* court conviction, so long as their petition alleged that they were in custody in violation of federal law.[46] And there was no question that *federal* prisoners similarly could repair to habeas as a means of collaterally attacking a federal conviction.[47] The more significant issue was the scope of review federal courts could undertake in exercizing that jurisdiction.

Initially, and into the 1930s, federal courts generally followed the same rule in collateral habeas proceedings that they followed in other collateral attacks on judgments. The only basis on which a judgment could collaterally be invalidated

[44] In 1942, the Supreme Court for the first time formally recognized the right of state prisoners to use federal habeas petitions to challenge the legality of their state court convictions on grounds that did not necessarily go to the state court's 'jurisdiction'. See *Waley v Johnston*, 316 US 101, 104–5 (1942) (*per curiam*). See generally Stephen I. Vladeck, 'The New Habeas Revisionism', *Harvard Law Review*, *124* (2011), 984–5 (summarizng the significance of this development). *Waley* opened the door, but did not settle, whether non-jurisdictional challenges could also be litigated in habeas petitions challenging *military* convictions, as well. See *Burns v Wilson*, 346 US 844 (1953) (Frankfurter, J., dissenting from the denial of rehearing).

[45] See *Johnson v Eisentrager*, 338 US 877 (1949) (memorandum) (granting certiorari).

[46] See 28 USC § 2241(c).

[47] See 28 USC § 2255.

was if the court that rendered the judgment acted without jurisdiction.[48] Any non-jurisdictional errors, no matter their extent, could not furnish an appropriate basis for habeas relief, because 'the writ of habeas corpus cannot be used as a writ of error'.[49] Thus, the Supreme Court's two famous habeas corpus decisions from the early decades of the twentieth century—*Frank v Mangum*[50] and *Moore v Dempsey*[51]—both turned on claims that the state court was unable properly to exercise its jurisdiction because of the mob violence surrounding the underlying trials.

In 1938, the Supreme Court took the first tentative but critical step toward a broader scope of collateral review in *Johnson v Zerbst*.[52] There, the Court held that it had the power in a habeas proceeding to reach the merits of the defendant's claim that he had been denied his Sixth Amendment right to counsel, even though such a right had not previously been thought to implicate the 'jurisdiction' of the trial court.[53] Writing for a 5-2 majority, Justice Black explained that, '[s]ince the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty'.[54] Of course, one could make similar arguments about a host of other constitutional rights, and so the holding in *Zerbst*, despite its 'kiss [of] the jurisdictional book',[55] may just as much have spelled its demise.

So it was less than four years later that the Court in *Waley v Johnston*[56] dropped any requirement that a claim be 'jurisdictional' in order to form a proper basis for collateral relief via habeas. Instead, the Court concluded, albeit without much discussion, that:

> the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights.[57]

To be fair, it would only be *subsequent* Supreme Court decisions—including those allowing *de novo* re-litigation of constitutional claims rejected by state courts[58] and the *de novo* litigation of claims never even *raised* in the state courts[59]—that would receive fame (or infamy) for so dramatically expanding the federal courts' role in supervising state criminal trials. But it was *Zerbst* and *Waley* that 'blazed a new trail' (as Justice Frankfurter put it in 1953),[60] and opened the door for the jurisprudence that followed.

[48] See Randy Hertz and James S. Liebman, *Federal Habeas Corpus Practice and Procedure* (Dayton, OH: LexisNexis, 5th edn, 2005), § 2.4d, 42–82.
[49] *Woolsey v Best*, 299 US 1, 2 (1936) (*per curiam*).
[50] 237 US 309 (1915).
[51] 261 US 86 (1923).
[52] 304 US 458 (1938).
[53] 304 US, 465–7.
[54] 304 US, 467.
[55] Henry J. Friendly, 'Is Innocence Irrelevant? Collateral Attack on Criminal Judgments', *University of Chicago Law Review*, *38* (1970), 151.
[56] 316 US 101 (1942) (*per curiam*).
[57] 316 US, 104–5.
[58] See, eg, *Brown v Allen*, 344 US 443 (1953).
[59] See, eg, *Fay v Noia*, 372 US 391 (1963).
[60] *Burns v Wilson*, 346 US 844, 846 (1953) (Frankfurter, J., dissenting from the denial of rehearing).

(2) Collateral review of courts-martial

Until the decision in *Zerbst*, the Supreme Court's jurisprudence concerning the scope of collateral review of convictions by *military* courts was no different from its approach to civilian courts. As Chief Justice Fuller explained in 1900:

> Courts Martial are lawful tribunals, with authority to finally determine any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced.[61]

It may not have made sense to use the same standard as in collateral review of civilian courts since, unlike their civilian brethren, military courts were not at the time subject to appellate review by *any* civilian court—including the US Supreme Court.[62] Nevertheless, the Court repeatedly held fast to the view that, in collateral challenges to convictions by courts-martial '[t]he single inquiry, the test, is jurisdiction'.[63]

Tellingly, even as the Court was expanding the scope of collateral review of civilian courts in *Zerbst* and *Waley*, it left the scope of collateral review of military tribunals alone. It wasn't until 1947 that *any* federal court purported to apply *Zerbst*'s broader conception of 'jurisdiction' to collateral review of a court-martial,[64] and no decision appears to have applied *Waley*. More to the point, in *Hiatt v Brown*, decided by the Supreme Court just over one month before it heard oral argument in *Eisentrager*, the Justices applied the classical 'jurisdictional' rule to a collateral attack on a court-martial without any discussion of *Zerbst* or *Waley*.[65] Writing for the Court, Justice Clark chastised the DC Circuit for:

> extending its review, for the purpose of determining compliance with the due process clause, to such matters as the propositions of law set forth in the staff judge advocate's report, the sufficiency of the evidence to sustain respondent's conviction, the adequacy of the pretrial investigation, and the competence of the law member and defence counsel.[66]

As Clark explained, 'the court-martial had jurisdiction of the person accused and the offence charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision'.[67]

The law with regard to courts-martial would change in 1953 when, in *Burns v Wilson*, the Court expanded the scope of review to claims that the military court failed to give 'full and fair consideration' to the defendant's constitutional objections.[68] The 'full and fair consideration' standard has not gone un-criticized, but

[61] *Carter v Roberts*, 177 US 496, 498 (1900).

[62] See, eg, *Ex parte Vallandigham*, 68 US (1 Wall.) 243 (1864). See generally *Burns*, 346 US 844–7 (Frankfurter, J., dissenting from the denial of rehearing) (questioning why military courts should receive *less* review than their civilian counterparts).

[63] *In re Grimley*, 137 US 147, 150 (1890).

[64] See *Shapiro v United States*, 69 F Supp 205, 207–8 (Ct Cl, 1947).

[65] 339 US 103 (1950). [66] 339 US, 110. [67] 339 US, 111.

[68] *Burns v Wilson*, 346 US 137 (1953).

whereas it is beyond question that it represents a broader scope of review than that which had previously been available, the critical point for present purposes is the state of the law in the spring of 1950. At least with regard to courts-martial, *Hiatt* demonstrated that it was crystal clear—and limited to 'jurisdictional' challenges in the classical sense.

(3) Collateral review of military commissions

Although the Supreme Court circa 1950 had considered far fewer cases involving collateral attacks on the judgments of military commissions (as opposed to courts-martial), there was no reason to suspect that the scope of review differed as between the two. Indeed, in both *Ex parte Quirin*[69] and *In re Yamashita*,[70] the Court had framed the question before it as whether the military commission properly exercised jurisdiction, invoking its court-martial jurisprudence as precedent.[71] To similar effect, the Court's Civil War-era decisions in *Ex parte Vallandigham*[72] and *Ex parte Milligan*[73] reflected identical jurisdictional precepts, with the Justices rejecting their jurisdiction to entertain an 'appeal' from a military commission in *Vallandigham*,[74] and concluding on collateral review that the commission in *Milligan* lacked jurisdiction.[75]

Indeed, the only wrinkle that appeared in the World War II-era cases arose in instances in which defendants were convicted by military commissions arguably convened under international, rather than US, authority. Thus, the US Supreme Court rejected its jurisdiction to entertain a habeas petition challenging the judgment of the International Military Tribunal for the Far East in *Hirota v MacArthur*,[76] even if the Justices were (deliberately) unclear as to whether the defect went solely to their power to hear such an 'original' claim, or to the power of the federal courts more generally to review such international tribunals.[77] And shortly after the DC Circuit decided *Eisentrager*, a separate panel of that intermediate appellate court turned away a habeas petition seeking to challenge one of the judgments of the Nuremberg Military Tribunal, holding that the NMT was, in effect, an international court, and so *Hirota* (which had not been clear on the issue) foreclosed *all* federal jurisdiction.[78]

In *Eisentrager*, though, there was no question that the commission that convicted the defendants acted exclusively under the auspices of US authority. Thus, the only claim the petitioners could have brought on the merits in their habeas petition was that the commission itself lacked jurisdiction to try them. If the commission properly exercised jurisdiction, that would necessarily have been the end of the matter.

[69] 317 US 1 (1942).
[70] 327 US 1 (1946).
[71] See, eg, *Yamashita*, 327 US 8; *Quirin*, 317 US 25.
[72] 68 US (1 Wall.) 243 (1864).
[73] 71 US (4 Wall.) 2 (1866).
[74] See 68 US (1 Wall.) 250–3.
[75] See 71 US (4 Wall.) 127–31; see also *Ex parte Yerger*, 75 US (8 Wall.) 85, 102–3 (1869).
[76] See 338 US 197 (1948) (*per curiam*).
[77] See generally Vladeck, above n 36, 1518 and n 107.
[78] See *Flick v Johnson*, 174 F 2d 983 (DC Cir, 1949). The Supreme Court declined to review *Flick* on the same day it agreed to review *Eisentrager*. *See Flick v Johnson*, 338 US 879 (1949) (memorandum).

(III) *Johnson v Eisentrager*

Of course, the lower federal courts never reached the *Eisentrager* petitioners' claim that the military commission that tried them lacked the jurisdiction to do so. As noted above, the district court dismissed the petitions on the ground that the Supreme Court's 1948 decision in *Ahrens v Clark* divested the federal courts of statutory jurisdiction over extraterritorial habeas petitions,[79] and the DC Circuit reversed, holding that the Constitution required access to the writ of habeas corpus for *anyone* in US custody.[80] Not surprisingly, then, the briefing before the Supreme Court focused on the lower courts' jurisdictional analysis—especially the DC Circuit's articulation of a global constitutional right to the habeas remedy. Indeed, one is hard-pressed to find in the hundreds of pages of briefing before the Supreme Court a solitary mention of the merits of the petitioners' claims anywhere other than the discussion of the factual background.

Thus, when the Court heard oral argument on 17 April 1950, the Justices' focus was necessarily on the decision below, and the question whether enemy aliens convicted by a US military commission were constitutionally entitled to access to the federal courts via habeas corpus. When the opinion came down six weeks later, on 5 June, six of the nine Justices answered that question in the negative, albeit somewhat obtusely.[81]

(1) The Supreme Court's decision

As I have explained elsewhere,[82] Justice Robert Jackson's opinion for the majority had four major analytical parts. In Part I, Jackson retraced the various legal and historical precedents with regard to the legal rights of citizens versus non-citizens, and, in particular, 'friendly' versus 'enemy' aliens.[83] As Jackson explained, constitutional protections for non-citizens flowed from their physical presence within the territorial jurisdiction of the United States, as opposed to any more basic principles of protection owed to them by the US government. During time of war, in particular, Jackson invoked the Alien Enemy Act of 1798[84] to underscore the dramatic distinction between the rights of non-citizens who owe allegiance to allies of the United States and those who owe allegiance to its enemies.[85] Thus, Jackson concluded, no historical precedent supported the conclusion reached by the DC Circuit below—ie that the Constitution confers rights even upon enemy aliens convicted by a US military commission overseas.[86]

Having laid the historical foundation in Part I, Jackson turned in Part II to the practical difficulties that the DC Circuit's opinion might provoke, especially given the number of enemy aliens then in US custody overseas.[87] As he explained:

[79] See above text accompanying notes 39–42. [80] See above text accompanying n 43.
[81] See *Johnson v Eisentrager*, 339 US 763 (1950). [82] See Vladeck, above n 14, 595–600.
[83] See *Eisentrager*, 339 US 768–77. [84] 50 USC §§ 21–4. [85] *Eisentrager*, 339 US 773.
[86] *Eisentrager*, 339 US, 777. [87] *Eisentrager*, 339 US, 777–80.

To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation of shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence. The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.[88]

To conclude to the contrary, Jackson continued, would be to recognize a constitutional right to habeas relief despite six distinct facts: that each of the petitioners:

(a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offences against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.'[89]

Explaining why such a result did not follow from the Court's earlier decisions in *Ex parte Quirin*,[90] *In re Yamashita*,[91] and *Hirota v MacArthur*,[92] Jackson concluded Part II with a tellingly ambiguous sentence: 'After hearing all contentions they have seen fit to advance and considering every contention we can base on their application and the holdings below, we arrive at the same conclusion the Court reached in each of these cases, *viz.* that no right to the writ of habeas corpus appears'.[93]

But the reason why 'no right to the writ of habeas corpus' appeared in *Quirin* and *Yamashita* was not because it was jurisdictionally unavailable; to the contrary, the Court in both cases was at pains to emphasise that it *could* decide at least whether the military commissions in each case had jurisdiction to try the defendants.[94] Instead, *Quirin* and *Yamashita* were *merits* decisions; no right to the writ of habeas corpus appeared in those cases because the Court ultimately concluded that both of the underlying military commissions validly exercised jurisdiction over the defendants.[95] Jackson thereby obfuscated whether a 'right to the writ of habeas corpus' was a right to judicial review in the first place (which the *Quirin* and *Yamashita* petitioners clearly had), or a right to *release* following meritorious judicial review.

To be sure, this ambiguous phrase might not be so blurry to modern eyes had that been the denouement of Justice Jackson's opinion for the *Eisentrager* Court. As I have written elsewhere, '[b]ased on the analysis in Parts I and II alone, Jackson's opinion could reasonably have been understood, at bottom, to deny to all enemy

[88] *Eisentrager*, 339 US, 778–9. [89] *Eisentrager*, 777. [90] 317 US 1 (1942).
[91] 327 US 1 (1946). [92] 338 US 197 (1948) (*per curiam*). [93] *Eisentrager*, 339 US 781.
[94] See above n 21 and accompanying text. [95] See *Yamashita*, 327 US 1; *Quirin*, 317 US 1.

aliens outside the territorial United States a constitutional right to habeas corpus. But Jackson did not stop there'.[96] Instead, Parts III and IV of the *Eisentrager* majority opinion turned to the merits of the petitioners' claims—and the question of whether the commission that tried them properly exercised jurisdiction.[97] Thus, Part III focused on the petitioners' claim that they were not generally subject to military jurisdiction, concluding that 'the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States'.[98] And Part IV focused on the specific challenges to the jurisdiction of the commission that convicted the petitioners.[99]

To that end, Justice Jackson briefly rehashed (and implicitly rejected) the detainees' argument that their underlying conduct was not a war crime,[100] before turning to the jurisdiction of the commission. On that issue, Jackson rejected the contention that the United States lacked the power to convene a military commission in China, holding that the President necessarily had the power to station troops there, and that, even if China objected, 'China's grievance does not become these prisoners' right'.[101]

Jackson then dismissed the argument that anything in the 1929 Geneva Convention precluded the assertion of military jurisdiction, noting in a footnote that '[r]ights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention'.[102] Finally, Jackson quickly sidestepped the two potential procedural irregularities that might have undermined the tribunal's jurisdiction. The first defect (concerning the Geneva Convention's requirement of pre-trial notice to the protecting power) had already been resolved against the detainees, he explained, by *Quirin* and *Yamashita*.[103] As to the second irregularity—that the commission followed procedures that differed too significantly from those of court-martial proceedings—Jackson observed that 'no prejudicial disparity is pointed out as between the Commission that tried prisoners and those that would try an offending soldier of the American forces of like rank'.[104] In other words, Jackson dismissed the contention as form without substance. Thus, he concluded, '[w]e are unable to find that the petition alleges any fact showing lack of jurisdiction in the military authorities to accuse, try and condemn these prisoners or that they acted in excess of their lawful powers'.[105]

As with the key sentence at the end of Part II of his opinion, this sentence, too, is revealing. If the rule for which *Eisentrager* meant to stand was one barring habeas to all non-citizens held outside the territorial United States, or even to all *enemy aliens* so detained, the jurisdiction of the commission that convicted the *Eisentrager* petitioners would have been utterly irrelevant. Indeed, if the federal

[96] Vladeck, above n 14, 597–8.
[97] See *Eisentrager*, 339 US 781–90.
[98] See *Eisentrager*, 339 US, 785.
[99] See *Eisentrager*, 339 US, 785–90.
[100] See *Eisentrager*, 339 US, 785–6.
[101] *Eisentrager*, 339 US, 789.
[102] *Eisentrager*, 339 US, 789 n 14.
[103] *Eisentrager*, 339 US, 790.
[104] *Eisentrager*, 339 US.
[105] *Eisentrager*, 339 US.

courts categorically lacked jurisdiction simply by virtue of the fact that the detainees were non-citizens held outside the United States, it would have been lawless for Jackson to even *reach* the merits of the petitioners' jurisdictional challenge to their military commission, let alone reject them.[106]

At the same time, as Justice Black pointed out in his opinion for the three dissenters,[107] there was something apparently inconsistent when taking together the different pieces of Justice Jackson's analysis:

> [T]he Court apparently bases its holding that the District Court was without jurisdiction on its own conclusion that the petition for habeas corpus failed to show facts authorising the relief prayed for. But jurisdiction of a federal district court does not depend on whether the initial pleading sufficiently states a cause of action; if a court has jurisdiction of subject matter and parties, it should proceed to try the case, beginning with consideration of the pleadings. Therefore Part IV of the opinion is wholly irrelevant and lends no support whatever to the Court's holding that the District Court was without jurisdiction.[108]

In fairness to Justice Jackson, there *is* a coherent way to explain his analysis: The district court held that it lacked statutory jurisdiction; the DC Circuit held that such a conclusion raised constitutional difficulties. Thus, one could understand Justice Jackson's majority opinion to hold that, (1) *because* the detainees' claim on the merits was ultimately unsuccessful, (2) the DC Circuit erred in concluding that the absence of statutory jurisdiction to hear their case raised constitutional concerns. Indeed, in a noteworthy decision less than two years earlier, the Second Circuit had employed just that kind of analysis in upholding an Act of Congress that took away federal jurisdiction. *Because* the constitutional claim the Act barred the federal courts from entertaining was itself without merit, the Act taking away the courts' power to say so did not raise constitutional concerns.[109] Perhaps that is what Justice Jackson had in mind in *Eisentrager*—because the detainees would not win on the merits anyway (as Parts III and IV established), there was no reason for the DC Circuit to controvert the historical norms identified in Parts I and II against enemy alien access to the courts, and no constitutional problem arising out of the absence of statutory jurisdiction.

(2) *Eisentrager*'s (properly reassessed) implications

We will never know what Justice Jackson meant for sure.[110] If nothing else, though, a careful reading of his opinion belies each of the categorical rules for which it is routinely cited. Clearly, *Eisentrager* did not mean categorically to foreclose access to habeas corpus for *all* non-citizens detained outside the territorial United States.

[106] As the Supreme Court had already explained in *Ex parte McCardle*, '[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause'. 74 US (7 Wall.) 506, 514 (1868).

[107] *Eisentrager*, 339 US 791–8 (Black J).

[108] *Eisentrager*, 339 US, 792 (citations omitted).

[109] See *Battaglia v General Motors Corp*, 169 F 2d 254 (2d Cir, 1948).

[110] Even his notes and draft opinions provide little evidence of his intentions. See Vladeck, above n 14, 596 n 56.

Just as clearly, it did not mean categorically to foreclose Fifth Amendment due process rights for all non-citizens detained outside the territorial United States. Instead, *Eisentrager* may stand for as little as the proposition that enemy aliens convicted overseas by a US military commission that properly exercised jurisdiction have no basis for collaterally attacking that conviction via habeas corpus. And even *that* rule may not survive the Court's subsequent expansion of collateral review of military courts in *Burns v Wilson*,[111] under which defendants may raise via habeas arguments that the military courts failed to give full and fair consideration to their constitutional claims.[112]

For non-citizens outside the territorial United States (who, regardless of *Eisentrager*, may have little in the way of freestanding constitutional protections), that may prove no better as a standard of review. Nevertheless, the underlying point remains: *Eisentrager* only makes sense as a holding if one gives value to Justice Jackson's analysis of the military commission's (proper) exercise of jurisdiction. Other decisions may stand for more categorical rules regarding the extraterritorial constitutional rights of non-citizens, but it is a misreading of *Eisentrager* itself to group it in that category—a misreading that is only exacerbated by the failure fully to appreciate the military commission proceedings that gave rise to the federal court litigation.

(IV) Conclusion

For many—if not most—of the war crimes trials surveyed in this volume, the lack of historical attention to the prosecution has obscured relevant lessons in legal history, politics, substantive international criminal law, or some combination of all three. In retrospect, it is hard to say the same about the military commission proceedings in *United States v Eisentrager*. Although the facts of *Eisentrager* were unique, the decision ultimately created little in the way of *new* substantive law going forward; it merely confirmed that certain already established principles also applied to the particular defendants in that case.

Instead, the hidden history of the *Eisentrager* proceeding matters for an altogether different reason. Understanding that the crux of the issue before the commission was its jurisdiction, and not any more specific question arising out of the charges, helps to illuminate Justice Jackson's opinion for the Supreme Court in *Johnson v Eisentrager*, and in particular the significance of his discussion in Parts III and IV of the appropriateness of military jurisdiction in that case. And whereas that revelation in and of itself serves to clarify the historical record and thereby undermines broad readings of *Eisentrager* (along with criticisms of the Supreme Court's *Boumediene* decision for its lack of fealty thereto), it may go even further.

Although the Supreme Court has never been forced to reach the issue, there is a non-frivolous argument that collateral challenges to the jurisdiction of military

[111] 346 US 137 (1953).
[112] See above text accompanying n 68.

courts are protected by the Constitution's Suspension Clause, given that a conviction by a military tribunal acting without jurisdiction is, in effect, another form of executive detention. Nevertheless, Congress in the Military Commissions Act of 2006 sought to bar such claims, enacting 10 USC § 950j(b):

> [N]otwithstanding any other provision of law (including section 2241 of title 28 or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever . . . relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.

This provision was repealed sub silentio by the Military Commissions Act of 2009, and so its constitutionality was never judicially tested. But had the issue been litigated, or if Congress enacts a similar jurisdiction-stripping provision in the future, *Eisentrager* would undoubtedly figure prominently in the legal analysis. And whereas the government might invoke the Supreme Court's 1950 decision as standing for the proposition that 'no right to the writ of habeas corpus appears', the reality is far more complicated—and should ultimately depend on whether the collateral challenge to the assertion of military jurisdiction has any merit.

PART 4

EUROPEAN HISTORIES III: CONTEMPORARY TRIALS

10

Making Peace with the Past: The Federal Republic of Germany's Accountability for World War II Massacres Before the Italian Supreme Court: The *Civitella* Case

Benedetta Faedi Duramy[*]

(I) Introduction

During World War II, the Hermann Göring Division settled in Civitella in Val di Chiana, a small village in Tuscany. Partisan groups also surrounded the area. On 18 June 1944, four German soldiers went to Civitella's town centre for a drink. Among the other customers were some Italian partisans who suddenly opened fire on the soldiers. Two soldiers died instantly, while a third died later. The German command threatened retaliation against the local population within twenty-four hours if they did not reveal the names of the partisans. Most of the inhabitants of Civitella and the nearby villages of Cornea and San Pancrazio hastily left their homes, fearing reprisals.

On 19 June, Wilhelm Schmalz, chief of the German command, invited civilians to return to their houses, assuring them that no retaliation would follow. However, on 29 June—the Saint Peter and Paul public holiday—three German squadrons suddenly stormed the crowded Civitella church, attacking the worshippers who had come from the nearby countryside to attend Mass. The death toll reached 244 civilians, including many women and children.

The massacres of Civitella, Cornea and San Pancrazio were forgotten until 10 October 2006, when the Italian Military Court of La Spezia convicted Max Josef Milde, a sergeant from the Hermann Göring Division, for his role in the massacre. Two years later, in October 2008, the Italian Supreme Court ruled that the Federal Republic of Germany had to pay one million dollars in reparations to the families of the victims.

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This chapter examines the untold story of the Civitella, Cornea and San Pancrazio massacres as revealed in the testimony of survivors and the relatives of the victims. The chapter also provides a detailed analysis of the much-anticipated war crimes trial before both the Italian Military Court of La Spezia and the Italian Supreme Court.

(II) Italian Massacres at the end of World War II

Between 1943 and 1945 several Italian villages and cities suffered massacres at the hands of the German army. Some of these were ruthless retaliations against partisan attacks, whiles others were part of a war against civilians that aimed at intimidating and terrorizing the entire population.[1] Slaughters were often carried out using a specific method. German soldiers would arrive at the villages very early in the morning, burst into the houses, drag all the men out of their beds, and then shoot them one by one in the main square.[2] In many cases, the true reason for the massacre was not always clear, leaving survivors haunted by the search for meaning and someone specific to blame.

According to several studies on the memories of Italian wartime massacres, the victims' families often identified local partisans as scapegoats.[3] Indeed, well known by the local community because of their renowned resistance to the fascist regime, partisans were best suited to being placed in the scapegoat role. For example, Contini reported that the son of one of the victims of the Civitella massacre declared: 'I can never forgive the partisans who have determined the massacre, but if I got to see the German who killed my father, I would forgive him today'.[4] Although in some cases massacres were carried out in response to the partisans' killing of German soldiers, in many other incidents the slaughter of civilians, including women and children, was not preceded by any partisan attacks.

Some historical circumstances may explain the cause of Italian wartime massacres. By the summer of 1943, the coalition of Germany, Italy and Japan was confronting the prospect of defeat.[5] Following the landing of British and American troops in Sicily in September 1943, Italy decided to break its military alliance with Germany. The Italian capitulation was viewed as an act of betrayal by the German army, thus fostering the idea that all Italians, both disarmed soldiers and civilians, were traitors to Germany.[6] Explicit orders demanded and approved retaliatory measures against civilians that engendered a series of massacres throughout Tuscany and in Rome.

1 Johan Foot, *Italy's Divided Memory* (Basingstoke: Palgrave Macmillan, 2009), 125–46.
2 Foot, above n 1, 125.
3 Giovanni Contini, 'Memorie in conflitto,' *l'impegno,* 2 (agosto 2001).
4 Contini, above n 3.
5 Elizabeth Zimmermann (2004), 'German war crimes in Italy,' *World Socialist Web Site*, <http://www.wsws.org/articles/2004/oct2004/germ-o07.shtml> (accessed 25 February 2013).
6 Foot, above n 1, 125.

In particular, in the case of Civitella, the German action was likely motivated by the strategic location of the village.[7] Indeed, by the late spring of 1944, Allied troops were advancing through the valleys surrounding Civitella toward Rome, which they liberated on 4 June. Breaking through the German defences in the area thus became strategically important for the Allied march. As it turned out, the hills around Civitella endured numerous confrontations between the British and the German forces during the first two weeks of June. Such historical analysis may thus explain the ruthless reprisals of the German army toward the population of Civitella and the nearby villages and farms.

(III) The Massacre of Civitella

After the massacre itself, survivors reported that they were so terrified that they decided to hide themselves in the forests nearby to avoid German retaliation. One witness to the massacre reported:

> [M]y brother in law . . . informed us that the partisans had killed two Germans and seriously wounded another . . . Terrified about the consequences, we took a few belongings and, in a heavy rainfall, we used a ladder to get out over the city walls. Many other people from Civitella were with us. Through the woods, we arrived at the house of a farmer and we stayed there for five days in great anxiety. Later people told us that the two nearby command posts had said that we could return without fear and we did so.[8]

Indeed, on 19 June, Wilhelm Schmalz, chief of the German command, issued his invitation. Many townspeople did not believe him and decided to stay away from their houses for a few days. After several days had passed without any retaliatory actions from the Germans, on 29 June—the Saint Peter and Paul public holiday—the population finally returned to their towns to celebrate the feast day and go to church.

At that point, the Göring Division surrounded the village and advanced through the town gates. Moving from house to house, the German soldiers broke down doors and opened fire on the men as they leaped from their beds. The widow of one of the victims of the massacre recalled:

> On the morning of 29 June 1944, I was home dressing my youngest daughter to take her to mass. My two other children had already left for church and my husband had gone to get mushrooms in the woods. Around 7 o'clock I thought I heard gunshots. I went to the door with my little daughter to see what was going on. I saw the villagers horrified, running from all sides shouting: 'The Germans are killing all the men!'.[9]

[7] Victoria de Grazia and Leonardi Paggi, 'Story of an Ordinary Massacre: Civitella della Chiana, 29 June, 1944,' *Cardozo Studies in Law and Literature*, *3* (1991), 153–69.

[8] Accounts from Anna Cetoloni, 'The Witnesses of Civitella,' *Cardozo Studies in Law and Literature*, *3* (1991), 171–95.

[9] Accounts from Ada Sistini, 'The Witnesses of Civitella,' *Cardozo Studies in Law and Literature*, *3* (1991), 173.

Survivors reported that the German soldiers primarily targeted the men. Some of them were brutally massacred on their doorsteps in front of their families. After killing all the townsmen they could find, the soldiers looted and burned their houses. A survivor remembered:

The Germans banged on the door enough to break it down. I summoned up my courage and went to open the door. My husband had stayed in the bedroom with the children. When I opened the door, there were four Germans armed with rifles and grenades on the threshold. Two of them came into the kitchen and the other two went upstairs. I said to them: 'Don't go up. Sick child. You frighten.' They answered 'Child, no!' A moment later I heard two shots . . . When I got to the bedroom, I saw that they had aimed at my husband's head and that he was taking his last breath. My son was already dead. They had killed him with a bullet in the head. My God! Where did I find my strength! I took a handkerchief and wiped his face where the wound was. I called him several times, but he showed no sign of life. I didn't know if I was dreaming or if it was true. I opened the window of my bedroom and started calling for help but people were running around madly and no one was listening to me. When I realised that flames were rising from the floor below I did not know what to do. I was no longer conscious of anything . . . I remember that two women passing by told me: 'Get out! Your house is on fire!'[10]

A widow of one of the victims of the massacre also recalled the torment of that morning:

[T]he terror began. Shots, bursts of machine gun fire, wild shouting, pounding on doors. And we three, there, completely terrorised, hugging one another until the moment we heard someone climb the stairs . . . and so my husband said: 'This time, it's our turn. Who knows what they will do to us?' At that moment, our bedroom was entered by a man—a demon—I couldn't say which—covered from head to toe with grenades, and ammunition, and a rifle in his hand. Frightening to see! He signalled my husband to get up. Then I went up to him and begged him to leave my husband alone. I told him he was sick and couldn't get up. I asked him if he had a heart inside him, to have pity on me and my child whose father he wanted to take away. I asked him if he had a mother and whether he remembered her now. But neither my begging nor my tears had any effect. He started to shout 'Raus! Raus!', howling so violently and savagely that I still hear it in my ears. Then my husband said to me: 'Give me my clothes, you see there's nothing to be done.' He was so upset and so pale that he couldn't even get dressed . . . Finally, I had to help my husband so he could go out and get killed.[11]

When they reached the main square, the three German squadrons suddenly stormed the crowded Civitella church, attacking the worshippers who had come from the nearby countryside to attend Mass.[12] A widow of one of the victims recalled:

[W]hen the mass was over, our priest turned toward the parishioners and said, 'My children, I think that this morning is going to be a bad morning. Give them whatever they ask of

[10] Accounts from Giuseppa Marsili, 'The Witnesses of Civitella,' *Cardozo Studies in Law and Literature*, *3* (1991), 179.

[11] Accounts from Uliana Merini, 'The Witnesses of Civitella,' *Cardozo Studies in Law and Literature*, *3* (1991), 174–5.

[12] De Grazia and Paggi, above n 7.

you so that nothing may happen. Courage!' Then the church filled with Germans. Germans stationed themselves behind the priest. Papa, Mama, myself and others hid behind an altar where we considered ourselves safe. But a German came, saw us, and told us to get out. Outside, people were yelling and many were already dead and the houses were starting to blaze. I placed myself between Papa and Mama, begging for mercy, my hands raised. They brought us to the middle of the square and Papa could no longer stand up... The square was filled with machine gunfire, flames were already coming out of the houses, dead bodies were lying in the streets.[13]

Sparing women and children, the German soldiers lined up all the men, including the parish priest—who cried out in vain: 'Kill me, but save the lives of my people'[14]—and shot them to death. Survivors reported that, after the slaughter, the Germans hid the bodies inside the houses and then burned all of the dwellings. In the end, the town of Civitella was completely destroyed.

Meanwhile, most of the women and children hastily left town, headed toward the nearby village of Poggiali, where some of them found shelter in the orphanage. Others took refuge with relatives or friends in the surrounding countryside. Following the slaughter in Civitella, the German squadrons moved aggressively into the surrounding villages of Burrone, Cornia, Gebbia, and San Pancrazio.[15] As was the case in Civitella, the German soldiers spared women and children in Gebbia and San Pancrazio, but killed all the men by shooting them in the head. In Cornia, by contrast, the action devolved into a wild massacre, with women and children being murdered along with the men. Ultimately, the death toll in the massacres reached approximately over 250 civilians.[16]

Over the following days, some women returned to Civitella to recover and bury the bodies of their loved ones. They remembered being 'among women alone' and 'giving each other a helping hand'.[17] One of them reported: 'I don't know how we had enough strength, we women, to do what we did; we transported our dead to the church all cooperating and helping one another.'[18] Another of the widows recalled:

It was I, his wife, who made him his coffin and when his coffin was made as best as possible we took a cart on which we placed my husband and two other men and we took them to the cemetery where I dug his grave myself.[19]

During the following years, Civitella became a ghost town, primarily inhabited by women who had lost their men in the tragedy and orphaned children.[20] Having

[13] Accounts from Maddalena Scaletti, 'The Witnesses of Civitella,' *Cardozo Studies in Law and Literature*, *3* (1991), 176–7.

[14] Accounts from Maria Assunta Menchetti, 'The Witnesses of Civitella,' *Cardozo Studies in Law and Literature*, *3* (1991), 193.

[15] Michael Geyer, 'Civitella delle Chiana on 29 June 1944,' in Hannes Heer and Klaus Naumann (eds), *War of Extermination: The German Military in World War II 1941–1944* (Oxford and New York, NY: Berghahn Books, 2000), 176.

[16] De Grazia and Paggi, above n 7, 154.

[17] De Grazia and Paggi, above n 7, 163.

[18] Accounts from Lucia Treppi, 'The Witnesses of Civitella,' *Cardozo Studies in Law and Literature*, *3* (1991), 190.

[19] Treppi, above n 18.

[20] De Grazia and Paggi, above n 7, 160.

the disadvantage of being a hill town, with no skilled men left and all the women traumatized by the death and war, Civitella faced a long period of economic struggle. Survivors reported that, initially, everybody wanted to leave the town and start their lives again somewhere else. Eventually, thanks to the women's resilience, Civitella was rebuilt. Nevertheless, the massacre left behind deep scars in the collective memory. People continued to remember the atrocities by sharing events that they had witnessed or accounts that others had experienced with one another.[21] By engaging continuously in a struggle against forgetting, survivors attempted to overcome the past and helped build a living memory of the traumatic events.

Local remembrance began to develop on 16 July 1944, when American and British troops finally liberated Civitella.[22] After the German ravages and the Allied bombardments, the town was a pile of ruins and burned dwellings. Arriving at the scene, an English military commission began a special investigation into the causes of the massacre.[23] Hundreds of surviving witness testimonies were compiled into a massive dossier of inquiry, which was sent to Rome but promptly disregarded by the transitional government. Some of the surviving widows' accounts were published in 1946 in Florence by the novelist Romano Bilenchi and others were published later in France.[24] In contrast, efforts to reconstruct the German side of the massacre failed due to the lack of records and documentation of the events, as well as the lack of testimony from the perpetrators.[25]

(IV) Accountability for the Massacre of Civitella before the Italian Supreme Court

Aside from a few historians' analyses and some commemorative monuments, the massacres of Civitella, Cornea and San Pancrazio, as well as their victims, have been forgotten for decades.[26] Only on 10 October 2006, did the Italian Military Court of La Spezia convict Max Josef Milde, a sergeant from the Hermann Göring Division, for his role in the massacre and sentence him to life imprisonment.[27] In the same ruling, the court also upheld the petitions for compensation for material and moral damages[28] as well as the legal expenses filed by the relatives of the victims, who had intervened in the criminal trial as a civil party.[29] In so doing, the Military

[21] Francesca Cappelletto, 'Memory of Extreme Events: From Autobiography to History,' *Journal of Royal Anthropological Institute*, *9* (2003), 241–60.

[22] De Grazia and Paggi, above n 7, 155. [23] Contini, above n 3.

[24] Geyer, above n 15, 177. [25] Geyer, above n 15, 178. [26] Foot, above n 1, 128.

[27] Max Josef Milde was found guilty of 'violence with murder against civilian enemies' under Article 185 of the Italian Military Criminal Code Applicable in Time of War, which provides for the crime of violence of members of Italian military forces against civilian enemies, in combination with Article 13 that extends the applicability of such a provision to crimes committed by members of enemy armed forces against the Italian State or individuals.

[28] Under civil law, moral damages are designed to compensate the physical or mental suffering and any similar harm unjustly caused to a person.

[29] Tribunale Militare di la Spezia, Judgment no. 49 of 10 October 2006.

Court of La Spezia held that the defendant and the Federal Republic of Germany were jointly and severally liable to pay reparations of about one million euros to the victims of the massacre.

According to Italian criminal procedure, civil claims can be brought within a criminal proceeding if the victim of the crime or any of the successors thereof asks for restitution in their capacity as a civil party. The eventual obligation to compensate the victims rests with the defendant and any other person the court might hold civilly accountable for the damage caused by the crime. Both the defendant and the person held civilly responsible are liable for paying the full amount, including material and moral damages as well as any legal expenses. The victim of the crime and any successors thereof may recover all the damages from either of them in accordance with the principle of joint and several liability.

Following the decision of the Military Court of La Spezia, the Federal Republic of Germany objected to the judgment on the grounds that it violated the international commitments undertaken by Italy under the Peace Treaty of 1947 and the Bonn agreements between Germany and Italy of 1961, as well as the 'jurisdictional immunity of Germany as a sovereign state'.[30] On 18 December 2007, the Italian Military Court of Appeal confirmed the previous decision, thus holding the Federal Republic of Germany and the defendant Max Joseph Milde jointly and severally liable to pay reparations to the victims of the massacre.[31] Finally, on 21 October 2008, the Italian Court of Cassation (as the court of last instance) rejected the appeal filed by the Federal Republic of Germany against the decision of the Military Court of Appeal, providing *inter alia* a pivotal interpretation of the principle of state immunity.[32]

It should be noted that the *Civitella* case is the first Italian case involving a civil action against a foreign state and its officials within a criminal proceeding.[33] In a previous case, the applicant, Luigi Ferrini, an Italian citizen who was captured by German troops near Arezzo and deported to a German slave labour camp in 1944, brought civil claims against the Federal Republic of Germany requesting compensation for physical and psychological harm due to inhumane treatment and forced labour.[34] However, Ferrini petitioned for restitution against the Federal Republic of Germany in a civil proceeding, rather than bringing a civil claim within a criminal trial. In the *Civitella* case, the victims of the massacre as civil parties specifically initiated a civil action for restitution against both the defendant and the Federal Republic of Germany within the context of a criminal prosecution of the wrongdoers.

[30] International Court of Justice, *Jurisdictional Immunities of the State* (*Germany v Italy*)—Application of the Federal Republic of Germany, 23 December 2008.

[31] Corte Militare di Appello, Judgment no 72 of 18 December 2007.

[32] Corte Suprema di Cassazione, sez. I penale, Judgment no 1072 of 21 October 2008, *Rivista di diritto internazionale* 92 (2009).

[33] See Annalisa Ciampi, 'The Italian Court of Cassation Asserts Civil Jurisdiction over Germany in a Criminal Case Relating to the Second World War,' *Journal of International Criminal Justice*, *7* (2009), 597–615.

[34] Tribunale of Arezzo, Judgment no 1403/98 of 3 November 2000.

(V) The Italian Supreme Court's Notion of the Principle of State Immunity

In the *Civitella* case, the Italian Supreme Court faced the question of whether the customary norm of international law that acknowledges the jurisdictional immunity of states for acts committed in the exercise of their sovereignty should also be applied in the event of conduct that amounts to an international crime.[35] The traditional position of the Italian courts recognized the customary international law principle of 'restrictive and relative immunity', meaning that foreign states are exempted from civil jurisdiction with respect to acts committed in the exercise of their state sovereignty (*iure imperii* acts), but not with respect to acts carried out by the state in a private capacity, independent of its sovereign power (*iure gestionis* or *iure privatorum* acts).[36]

This traditional position on the doctrine of state immunity had already been overturned by the Italian Supreme Court in the *Ferrini* judgment (no 5044 of 11 March 2004).[37] In that case, the Civil Plenary Session of the Court held that the principle of restrictive immunity should be subject to limitation in the event that state conduct, even if related to the exercise of sovereign powers (such as those performed in the course of war operations), constitutes such a serious violation of human freedom and dignity that it qualifies as an international crime. Indeed, the Court acknowledged that the protection of human rights is a fundamental principle of international law, thus decreasing the significance of other principles, including the recognition of state immunity from any foreign civil jurisdiction. Therefore, the customary norm of international law that obligates states to abstain from exercising their jurisdictional power over foreign states is not absolute, insofar as it does not grant them total immunity from civil jurisdiction in the case of serious violations of universal values and fundamental human rights norms.[38]

Based on that reasoning, the Italian Supreme Court overturned the decisions of both the Tribunal of Arezzo and the Court of Appeal in Florence, which had dismissed Ferrini's petition on the ground that Italian courts had no jurisdiction over acts committed by foreign states in the exercise of their sovereign authority.[39] The Court went on to acknowledge Italian jurisdiction with respect to the civil

[35] Corte Suprema di Cassazione, sez. I penale, Judgment no 1072 of 21 October 2008, [3].

[36] Corte Suprema di Cassazione, above n 35.

[37] Corte Suprema di Cassazione, sezioni unite civili, Judgment no 5044 of 6 November 2003, Ferrini, *Rivista diritto internazionale* 87 (2004), 539. See also Pasquale De Sena and Francesca De Vittor, 'State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case,' *The European Journal of International Law*, *16* (2005), 89–112; Carlo Focarelli, 'Denying Foreign State Immunity for Commission of International Crimes: The Ferrini Decision,' *International Comparative Law Quarterly*, *54* (2005), 951–8; Andrea Gattini, 'War Crimes and State Immunity in the Ferrini Decision,' *Journal of International Criminal Justice*, *3* (2005), 224–42; Andrea Gattini, *'Ferrini'*, in Antonio Cassese et al (eds), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009), 668–70.

[38] *Ferrini*, above n 37.

[39] See Tribunale di Arezzo, decision no 1403/98 of 3 November 2000; and Corte d'Appello di Firenze, decision no 41/02 of 14 January 2002.

claims brought against the Federal Republic of Germany by Ferrini, holding that Ferrini's deportation and subjugation to forced labour should be considered war crimes under international law.[40]

In addition to mentioning the *Ferrini* precedent in its reasoning in the *Civitella* case, the Italian Supreme Court referred to other rulings that confirmed the pivotal juncture marked by *Ferrini* itself.[41] In particular, the Supreme Court made reference to its own ruling in the *Lozano* case, which held that servicemen who commit war crimes amounting to severe breaches of international humanitarian law while performing official duties cannot enjoy functional immunity from foreign criminal courts.[42] The Court thus concluded that a sufficiently unambiguous trend has emerged in the previous years, one that excluded the immunity of foreign states from civil jurisdiction with respect to international crimes.[43] The Court expressed its full support for this hermeneutical position, holding that the customary principle of jurisdictional immunity of states is not absolute, and does not apply in cases of conflict with the principle of customary international law that permits judicial remedies for damages caused by international crimes arising from serious breaches of human rights.[44]

The Federal Republic of Germany objected to this conclusion, arguing that, according to various rulings of numerous national supreme courts, the principle of state immunity from civil jurisdiction was an absolute value that could not be subject to any limitation, including in the case of international crimes. In its view, the Italian Supreme Court's position on the doctrine of state immunity under the *Ferrini* decision and subsequent rulings did not conform to international practice and did not comply with the international norm effectively in force among states.[45] In response, the Court insisted that it had already conducted an accurate analysis of foreign courts' decisions, both those upholding the principle of state immunity and those where courts held that the principle of jurisdictional immunity could not paralyse the exercise of judicial remedies for international crimes arising from the violation of fundamental human rights.[46]

The Italian Supreme Court also emphasized that the solution to the issue could not be found merely through a quantitative analysis, nor could it depend solely on tallying the number of decisions that support one position or the other. The examination of foreign states' case law, it acknowledged, is indeed an important tool for ascertaining the effectiveness of customary norms of international law. Nevertheless,

[40] Corte Suprema di Cassazione, sezioni unite civili, Judgment no 5044 of 6 November 2003; *Ferrini*, above n 37.

[41] Corte Suprema di Cassazione, Sezioni Unite Civili, Judgment no 14199 of 6 May 2008, '*Repubblica Federale di Germania v Amministrazione Regionale of Vojotia*', in *Rivista di diritto internazionale*, 92 (2009), 594. With this decision, the Italian Supreme Court recognised in Italy the civil judgment of the Greek Special Supreme Court against the Federal Republic of Germany in relation to a massacre committed by the German troops in Greece during World War II.

[42] Corte Suprema di Cassazione, Judgment no 31171/2008 of 24 July 2008. For a critical comment on the Court's decision, see Antonio Cassese, 'The Italian Court of Cassation Misapprehends the Notion of War Crimes,' *Journal of International Criminal Justice*, 6 (2008), 1077–89.

[43] Corte Suprema di Cassazione, sez. I penale, Judgment no 1072 of 21 October 2008.

[44] Corte Suprema di Cassazione, above n 43.

[45] Corte Suprema di Cassazione, above n 43[4].

[46] Corte Suprema di Cassazione, above n 43.

the Court pointed out that the function of the interpreter cannot be reduced to an arithmetic calculation of data obtained from international practice. Instead the interpreter must grapple with verifying the real existence of customs and norms, their qualitative consistency, the interrelationships among them, as well as the practical nexus of their interdependence and hierarchical collocation within the range of values generally accepted by the international system.[47]

Considering the above, the crucial question before the Court was whether the principle of jurisdictional immunity of foreign states constituted an unconditional and unlimited rule, or whether other customary norms protecting the supreme values of human beings should ultimately prevail. The complexity of answering such a question arises from the coexistence of diverse customary norms of international law, whose different areas of application should be coordinated by ascertaining whether they are compatible or whether the application of one should prevail over the other.[48] In fact, the principle of jurisdictional immunity of states represents a customary norm generally recognized by the international community in relation to activities that constitute a direct externalization of sovereign powers. Likewise, it is indisputable that customary norms aimed at protecting the freedom and dignity of human beings have long been considered to be fundamental values and inalienable rights within the international system.[49]

It follows that the violations of human rights protected by such customary norms constitute international crimes, which must be prosecuted and punished by any state inasmuch as they undermine the primary interests of the international system. Of particular concern within the categories of international crimes are crimes against humanity, whose connotations include the following: they entail a serious violation of human dignity and severe humiliation of one or more civilians; they are not occasional or isolated incidents, but rather constitute a systematic practice of atrocity; and they must be prosecuted and punished equally if committed during armed conflict or if committed in peacetime.[50] In the words of the Court, the norms protecting fundamental human rights convey the supremacy of the fundamental principle for the respect of human dignity, whose violation also marks a tolerable breaking point for state sovereignty. Therefore, the principle of the sovereign equality of states must not apply in the event of crimes against humanity or in the case of serious criminal actions that constitute an abuse of state sovereignty.

The Court further acknowledged that the coexistence in the same case of international customary norms regarding, on the one hand, the immunity of the states from jurisdiction and, on the other hand, the restitution of serious violations of fundamental human rights requires their respective coordination in order to ascertain which norms should prevail. Such a conflict of norms can only be resolved by balancing interests, giving precedence to the ius cogens principle, thus ensuring that the most serious crimes against human freedom and dignity will not remain unpunished.[51]

[47] Corte Suprema di Cassazione, above n 43.
[48] Corte Suprema di Cassazione, above n 43, [5].
[49] Corte Suprema di Cassazione, above n 43.
[50] Corte Suprema di Cassazione, above n 43.
[51] Corte Suprema di Cassazione, above n 43, [6]. See also Corte di Cassazione Sezione I, Lozano, 19 June 2008.

If it is true that the customary norms protecting fundamental human rights are based on universal and binding principles recognized by the entire international community, the internal coherence of the system requires that the violation of such fundamental values should be followed by an effective reaction on the part of both the international system and the victims themselves. As the Court noted, it would make no sense to proclaim the primacy of fundamental human rights and then restrict access to justice, thus preventing the victims from resorting to the remedies that are indispensable to ensure the effectiveness and primacy of those fundamental rights.[52]

Finally, the Italian Supreme Court acknowledged that, in accordance with Article 10 of the Italian Constitution, the Italian legal system complies with the norms generally recognized under international law.[53] It also clarified that Italy's internal legal system must automatically and continuously conform to the customary rules and general principles accepted by the international community.[54] However, the Court also emphasized that such compliance cannot infringe the essential foundations of the Italian legal system, which are essential to the current constitutional structure, absolutely binding, and thus unchangeable. Fundamental human rights are among such constitutional principles and cannot be derogated by international norms.[55]

(VI) Developments Following the Italian Supreme Court's Decision in the *Civitella* Case

Following the decision of the Italian Supreme Court in the *Civitella* case, on 23 December 2008 the German government instituted proceedings against Italy before the International Court of Justice, contending that 'through its judicial practice…Italy has infringed and continues to infringe its obligations toward Germany under international law'.[56] The Federal Republic of Germany argued that since the *Ferrini* judgment of 11 March 2004, 'Italian judicial bodies have repeatedly disregarded the jurisdictional immunity of Germany as a sovereign State'.[57] It also stressed that subsequent to the *Ferrini* judgment, victims of World War II had instituted numerous other proceedings before Italian tribunals. The German government expressed concern that many additional legal actions might similarly follow the *Civitella* decision.[58]

[52] Corte Suprema di Cassazione, sez. I penale, Judgment no 1072 of 21 October 2008, above n 43, [7].
[53] See the *Italian Constitution*, Article 10.
[54] Corte Suprema di Cassazione, sez. I penale, Judgment no 1072 of 21 October 2008, above n 43, [7].
[55] Corte Suprema di Cassazione, above n 43.
[56] United Nations Sixty-fifth Session, *Report of the International Court of Justice*, 1 August 2009–31 July 2010, A/65/4, 37.
[57] International Court of Justice, *Jurisdictional Immunities of the State* (*Germany v Italy*)—Application instituting proceedings filed in Registry of the Court on 23 December 2008, 4.
[58] *Germany v Italy*, above n 57.

In light of the above, the German government argued that 'the recourse to the International Court of Justice represent[ed] the only remedy available to Germany in its quest to put a halt to the unlawful practice of the Italian courts, which infringes its sovereign rights'.[59] In particular, the Federal Republic of Germany sought to obtain a decision from the International Court of Justice stating that the claims related to the serious violations committed by German troops against Italian civilians during World War II constitute a breach of international law and agreements between the two countries. Indeed, Germany argued that, according to the Peace Treaty signed in Paris on 10 February 1947, between Italy and the Allied Powers, Italy waived on its own behalf and on behalf of its nationals all claims against Germany in relation to compensation for damages incurred during World War II.[60]

Furthermore, Germany contended that the Italian claims were inadmissible by virtue of the Bonn agreement concluded on 2 June 1961 between Italy and the Federal Republic of Germany, which settled all outstanding claims of Italian nationals based on rights violations and other incidents that occurred between 1 September 1939 and 8 May 1945.[61] It is interesting to note that the Italian Supreme Court held that the 1947 Peace Treaty should not apply because the Federal Republic of Germany was not a signatory party to the treaty itself. Moreover, in relation to the Bonn Agreement of 1961, the Italian Supreme Court reasoned that because the agreement applied only to the disputes that were already pending at the time of signature, it did not settle claims that had not been instituted at that date, as was the case for *Civitella*.[62]

In its application, Germany lamented that a special team of lawyers had to be appointed to deal specifically with such complaints, requiring burdensome financial and intellectual expenditures. Furthermore, Germany claimed that, through its judicial practice, Italy has been infringing Germany's jurisdictional immunity, thus breaching the principle of sovereign immunity and sovereign equality under international law.[63] In concluding its application, the Federal Republic of Germany urged the International Court of Justice to recognize the international responsibility of Italy, to declare that its judicial decisions in relation to the claims brought by Italian nationals should remain unenforceable, and to ensure that no future legal actions based on similar claims will be pursued by Italian courts against Germany.[64]

On 29 April 2009, Italy filed its counter-claim, asking the International Court of Justice to reject the claims presented by Germany and to recognise its international responsibility for denying Italian victims adequate and effective reparations for the crimes committed during World War II by German troops.[65] Two years later, on 13 January 2011, Greece filed an application before the International Court of

[59] *Germany v Italy*, above n 57.

[60] International Court of Justice, *Jurisdictional Immunities of the State* (*Germany v Italy*)—Counter-Claim, 6 July 2010, 4.

[61] *Germany v Italy*, 5. [62] Ciampi, above n 33, 612. [63] Ciampi, above n 33, 18.

[64] Ciampi, above n 33.

[65] United Nations Sixty-fifth Session, *Report of the International Court of Justice*, 1 August 2009–31 July 2010, above n 57, 39.

Justice requesting permission to intervene in the proceedings.[66] Indeed, following the claims brought by Italian nationals against Germany for crimes committed during World War II, Greek nationals attempted to 'enforce in Italy a judgment obtained in Greece on account of a similar massacre committed by German military units during their withdrawal in 1944 (*Distomo* case)'.[67] In filing the application, the Hellenic Republic thus sought to inform the International Court of Justice that the legal rights and interests of Greek nationals could be affected by the decisions of the Court in relations to the claims advanced by Germany.[68]

(VII) Conclusion

On 3 February 2012, the International Court of Justice found that Italy violated its obligation to respect the Federal Republic of Germany's immunity under international law by allowing civil claims to be brought against it based on violations of international law committed by the German regime during World War II.[69] Moreover, it held that Italy had to ensure, by enacting appropriate legislation or by resorting to other methods of its choosing, that the decisions of its courts and those of other judicial authorities infringing the immunity of the Federal Republic of Germany ceased to have effect.[70] According to the International Court of Justice, in other words, the Italian Supreme Court's decision in the *Civitella* case was incompatible with international law and represented a breach of international agreements between the two countries, making the Italian courts' decisions unenforceable. Indeed, the International Court of Justice clarified that, 'under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict'.[71] A similar conclusion thus appertains to Greece's attempt to protect legal claims and interests of its nationals for massacres committed by Germany during the conflict.

Human rights organizations protested that the International Court of Justice ruling represented a great step backwards for international law by placing state sovereignty above the protection of international human rights. Despite the unfavourable outcome, the Italian Supreme Court's decision in the *Civitella* case constitutes a significant attempt to restrict the principle of sovereign immunity with respect to serious violations of international law. Indeed, the judgment suggests that, in the event of egregious breaches of international law, a human rights exception should

[66] International Court of Justice, *Jurisdictional Immunities of the State* (*Germany v Italy*)—Greece requests permission to intervene in the proceedings, 13 January 2011.

[67] International Court of Justice, *Jurisdictional Immunities of the State* (*Germany v Italy*)—Application instituting proceedings filed in Registry of the Court on 23 December 2008, 16.

[68] *Germany v Italy*, above n 67.

[69] International Court of Justice, *Jurisdictional Immunities of the State* (*Germany v Italy, Greece Intervening*)—Judgment of 3 February 2012.

[70] *Germany v Italy, Greece Intervening*, n 69 above.

[71] *Germany v Italy, Greece Intervening*, n 69 above, 37.

apply, preventing the responsible state from enjoying jurisdictional immunity. If the International Court of Justice had concluded that the Federal Republic of Germany was liable for the damages caused to the victims of the Civitella massacre, customary norms protecting fundamental human rights and freedoms would have prevailed in case of conflict with the principle of state immunity and thus would have qualified as peremptory norms under international law.[72]

[72] Francesco Moneta, 'State Immunity for International Crimes: The Case of Germany versus Italy before the ICJ—*Jurisdictional Immunities of the State* (*Germany v Italy*),' *The Hague Justice Portal*, 3.

11

Trying Communism through International Criminal Law? The Experiences of the Hungarian Historical Justice Trials

Tamás Hoffmann[*]

This chapter aims to critically analyse the attempts of the Hungarian judiciary to address crimes committed during the 1956 revolution through the use of international law.[1] These so-called historical justice trials undertook to uncover the true history of the mass atrocities perpetrated against civilians suppressed during the communist regime and bring the perpetrators to justice. However, the Hungarian judiciary proved unable to apply international criminal law, which led to a series of contradictory judgments that left the general populace confused. Coupled with the absence of a popular desire to confront the country's past, the predominantly technical approach of the trials not only could not fulfil their purpose but might have exacerbated the general indifference. This chapter will thus have a two-fold goal: to demonstrate the inherent problems associated with the direct application of international criminal law in a domestic legal environment, and to tell the story of an unsuccessful attempt to substitute criminal procedures for social reconciliation. In this sense, this is the untold story of the Hungarian historical justice trials that tried to confront the public with their hidden history of mass atrocity.

(I) Introduction—Crimes of Past, Dilemmas of Transition

Following a short period of unprecedented democracy between 1945 and 1949, Hungary became a communist country in 1949. The ensuing brutal oppression

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[1] This chapter builds on and develops concepts set out in Tamás Hoffmann, 'Individual Criminal Responsibility for Crimes Committed in Non-International Armed Conflicts—The Hungarian Jurisprudence on the 1956 Volley Cases', in Stefano Manacorda, Adán Nieto (eds), *Criminal Law Between War and Peace: Justice and Cooperation in Criminal Matters in International Military Interventions* (Castilla-La Mancha: Cuenca, 2009), 735.

under the leadership of Mátyás Rákosi was characterized by nationalizations, mass deportations, the persecution of 'class enemies' and show trials. Even though the repression subsided in 1953, after the death of Stalin, in 1955 the reformist prime minister, Imre Nagy, was dismissed and the coterie of Rákosi returned to power.[2]

On 23 October 1956 the population's general disappointment with the Rákosi leadership manifested itself in peaceful demonstrations throughout the country. These rallies, however, escalated into violence prompting the spontaneous emergence of insurgent groups fighting against government troops. While these hostilities remained localized, with their main centre in Budapest, they ostensibly achieved their ambition: Imre Nagy took the helm again on 28 October. However, the intervention of the Soviet army on 4 November sealed the fate of the short-lived revolution and gave power to János Kádár, who controlled the country until 1988.[3] The Kádár regime quickly consolidated its authority. Between 1957 and 1962 about 22,000 people were tried for participating in the revolution. Hundreds of revolutionaries were sentenced to death and executed, including Imre Nagy, and thousands were incarcerated. Yet despite the harsh and wide-ranging retribution, the communist leadership's policy of gradually increasing the average standard of living resulted in general support for 'goulash communism'. Until the economic hardships of the 1980s, the communist leadership was regarded as legitimate by the majority of the population.

The transition to democracy was peaceful and took place formally in the context of 'Roundhouse Talks', where representatives of the opposition and the ruling Hungarian Socialist Workers' Party agreed on the design of the constitutional framework. In the meantime, the reburial of Imre Nagy turned out to be a massive anti-communist demonstration, which indicated the general desire of the people for regime change.[4]

In 1990, the first free election brought about victory for a right-wing coalition, which attempted to redress the injustices of the communist era. Beyond the limited restitution of nationalized property[5] and the adoption of a lustration law,[6] the 'historical justice debate' largely focused on the potential prosecution of persons responsible for crimes committed during the communist era.[7] These debates had highly political overtones. The liberal opposition questioned the prudence of criminal

[2] Latvinia Stan, 'Hungary', in Latvinia Stan (ed), *Transitional Justice in Eastern Europe and the Former Soviet Union* (London: Routledge, 2009) 102, 104–7.

[3] For a more detailed background see Csaba Békés, Malcolm Byrne, János M. Rainer (eds), *The 1956 Hungarian Revolution: A History in Documents* (Budapest and New York, NY: CEU Press, 2002).

[4] Renáta Uitz, 'Instead of Success: Hope for Truth—At Best', in Peter Jambrek (ed), *Crimes Committed by Totalitarian Regimes,* (Slovenian Presidency of the Council of Europe, 2008) 286, 287. However, it must be pointed out that the burial of János Kádár, which took place just a few weeks after the Imre Nagy reburial, also attracted a huge crowd. Presumably many—if not most—people attended both events.

[5] See Csongor Kuti, *Post-Communist Restitution and the Rule of Law* (Budapest and New York, NY: CEU Press, 2009).

[6] Mark S. Ellis, 'Purging the Past: The Current State of Lustration Laws in the Former Communist Bloc', *Law and Contemporary Problems*, *59* (1996), 183–5.

[7] Other post-communist countries faced similar dilemmas. See for example Adrienne M. Quill, 'To Prosecute or Not to Prosecute: Problems Encountered in the Prosecution of Former Communist Officials in Germany, Czechoslovakia and the Czech Republic', *Indiana International and Comparative Law Review*, *7* (1996), 165.

trials decades after the fact[8] and feared that criminal prosecution could be used as a tool to engage in 'decommunization', effectively singling out persons holding influential positions in the previous regime.[9] However, it was pointed out that punishing 'comrades' during the communist era was hardly feasible since the party exercised complete control over all legal accountability mechanisms, which went so far that 'the chief prosecutor issued written 'top secret' orders requesting all law enforcement bodies to get approval from the Hungarian Socialist Workers' Party before the arrest or prosecution of communist officials on any grounds.'[10]

In practice, the initiation of criminal investigations was hindered by the fact that substantive criminal provisions in force at the time of the commission of the acts, the Official Compilation of Penal Regulations in Force,[11] and the subsequently adopted Criminal Codes[12] specified a rule of prescription of fifteen years and later twenty years for voluntary manslaughter. Conventionally, statutory limitations serve the important role of preventing prosecutions that would involve significant resources and would present huge practical difficulties after a considerable passage of time.[13] However, in the view of the parliamentary majority, the objective of ensuring the accountability of communist criminals warranted extraordinary measures. In an attempt to overcome this obstacle, the legislature adopted an act that stipulated that in case of treason, voluntary manslaughter and infliction of bodily harm resulting in death committed between December 1944 and May 1990, prescription resumes 'provided that the state's failure to prosecute said offences were due to political reasons'.

The law generated much controversy due to its vague language and the inclusion of the crime of treason. It was feared that the law would allow the courts to use it against the supporters of the previous regime. However, the proposal was found unconstitutional by the Constitutional Court, which interpreted the principle of legality as covering 'every aspect of criminal liability' and therefore concluded that the modification or reactivation of an already lapsed statute of limitation would violate this principle. The Court made clear that 'conviction and punishment can only proceed according to the law in force at the time of the commission of the crime'.[14]

[8] For the background of the historical justice debate and the moral implications involved see János Kis, 'Töprengés az Időről—Sortűzperek Előtt' [Meditation on Time—Before Firing Squad Trials], *Kritika*, *5* (1994), 5.

[9] Krisztina Morvai, 'Retroactive Justice Based on International Law: A Recent Decision by the Hungarian Constitutional Court', *East European Constitutional Review*, *3* (1994), 32.

[10] Morvai, above n 9, 33.

[11] In 1952, the Ministry of Justice published the Official Compilation of Penal Regulations in Force (Hatályos Büntetőjogi Szabályok Hivatalos Összeállítása), which compiled the existing laws concerning criminal acts. While it was not a statute, it was still utilized as such in the absence of a codified Criminal Code proscribing criminal offences.

[12] *1961. évi V. Törvény a Magyar Népköztársaság Büntető Törvénykönyvéről* [Law No V of 1961 on the Criminal Code of the People's Republic of Hungary] (Hungary) and *1978. évi IV. Törvény a Büntető Törvénykönyvről* [Law No IV of 1978 on the Criminal Code] (Hungary) (Criminal Code).

[13] Ilias Bantekas, *International Criminal Law* (Oxford: Hart, 4th edn, 2011), 28.

[14] A Magyar Köztársaság Alkotmánybírósága [Constitutional Court of the Republic of Hungary], No 11/1992, 5 March 1992 (Decision 11/1992) [Hungarian Constitutional Court] (Hungary) (translation), <http://www.mkab.hu> (accessed 28 February 2013).

To circumvent the problem of retroactive effect, legislators opted to rely on crimes under international law, where the statute of limitations was supposedly no longer an obstacle. The Parliament adopted a statute on 16 February 1993 entitled 'The Procedure to Follow in Case of Certain Crimes Committed During the 1956 War of Independence and Revolution'. This draft law penalized a mixture of international and common crimes, including violation of personal freedom and terrorist acts, whose retroactive application had already been found unconstitutional by the Constitutional Court. Consequently, it did not come as a surprise when the Court reiterated its previous judgment regarding the effect of statutory limitations on common crimes and found that in that respect the statute of limitation had run out.[15] Yet the Constitutional Court developed a line of argument that enabled the prosecution of international crimes. It relied on Article 7(1) of the Hungarian Constitution, which states that '[t]he legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonise the country's domestic law with the obligations assumed under international law'.[16]

According to this interpretation, customary law, *jus cogens*, and possibly general principles of law become part of the Hungarian legal system automatically, without any implementing legislation. Incorporation occurs via a rule of 'general transformation' prescribed by Article 7(1) of the Constitution.[17] Other interpretations, however, assert that international treaties still have to be incorporated into the Hungarian legal order by way of publication upon ratification in the Official Gazette.[18]

The Constitutional Court declared that crimes against humanity and war crimes are 'undoubtedly part of customary international law; they are general principles recognised by the community of nations'.[19] As a result, the problem of statutory limitations is resolved, since:

> International law applies the guarantee of *nullum crimen sine lege* to itself, and not to the domestic law. 'Customary international law', 'legal principles recognised by civilised nations', 'the legal principles recognised by the community of nations', is such a lex, or a body of written and unwritten laws, which classifies certain behaviour prosecutable and punishable according to the norms of the community of nations (via international organisations or membership in a given community of states), irrespective whether the domestic law contains a comparable criminal offence, and whether those offences have been integrated into an internal legal system by that country's accession to the pertinent international agreements.[20]

[15] Duc V. Trang, 'Beyond the Historical Justice Debate: the Incorporation of International Law and the Impact on Constitutional Structures and Rights in Hungary', *Vanderbilt Journal of Transnational Law*, *28* (1995), 1.

[16] *1949. évi XX. törvény a Magyar Köztársaság Alkotmányáról* [Law No XX of 1949 on The Constitution of the Republic of Hungary] (Hungary) Article 7(1) [Hungarian Constitutional Court] (Hungary) (translation), <http://www.mkab.hu> (accessed 28 February 2013).

[17] A Magyar Köztársaság Alkotmánybírósága [Constitutional Court of the Republic of Hungary] (Hungary), No 53/1993, 13 October 1993. (Decision No 53/1993) [International Committee of the Red Cross] (translation), <http://www.icrc.org> (accessed 28 February 2013).

[18] See more in detail Pál Sonnevend, 'Verjährung und Völkerrechtliche Verbrechen in der Rechtsprechung des Ungarischen Verfassungsgerichts' [Statutory Limitations and the Prosecution of Violations of International Humanitarian Law in the Jurisprudence of the Hungarian Constitutional Court], *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, *57* (1997), 195.

[19] Decision No 53/1993, section V.

[20] Decision No 53/1993, section V.

The Court concluded that since Hungary has ratified the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity,[21] the perpetrators of crimes falling within the purview of the Convention could be prosecuted by the authorities; moreover, the authorities were under an obligation to carry out investigations.[22] Even though this interpretation was not entirely free of constitutional difficulties,[23] it offered a way out of the historical justice conundrum. The Court found that the prosecution of crimes concerning the 1956 revolution was constitutional if these acts qualified as crimes under international law, ie war crimes or crimes against humanity.[24] Nevertheless, the legislature still could not cope with the task of drafting a law conforming to these parameters. Although the Parliament amended the text of the Act and eliminated the unconstitutional first paragraph on ordinary crimes, the new law still linked Article 130 of Geneva Convention III and Article 147 of Geneva Convention IV proscribing grave breaches of the Conventions, which can be committed in international armed conflict, to Common Article 3 of the Geneva Conventions regulating the minimum rules applicable to non-international armed conflicts.[25]

Inevitably, the Constitutional Court was compelled to examine the constitutionality of the re-enacted law and predictably quashed it for establishing these connections contrary to the clear language of the Conventions.[26] Still, the Court declared that:

> [w]ith the nullification of the law there is no obstacle preventing the state from pursuing the offender of war crimes and crimes against humanity as defined by international law . . . It is international law itself which defines the crimes to be persecuted and to be punished as well as all the conditions of their punishability.[27]

[21] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, opened for signature 26 November 1968, 754 UNTS 73 (entered into force 11 November 1970).

[22] Decision No 53/1993, section V(2).

[23] Bragyova pointed out that even following the Court's logic, the Constitution could only 'transform' customary international law into Hungarian domestic law from the date of the adoption of this constitutional norm. Article 7(1) was only adopted in 1989, before that date no similar constitutional provision existed regulating the relationship between international law and Hungarian law. Consequently, this constitutional provision cannot have retroactive effect. András Bragyova, 'Igazságtétel és Nemzetközi Jog' [Historical Justice and International Law], *Állam- és Jogtudomány*, *34* (1993), 233–9. Significantly, Article 4 of the 1968 Convention requires States Parties to adopt legislative measures to prevent the application of statute of limitations 'in accordance with their respective constitutional processes.' As a result, 'neither practice nor opinio juris prohibits states from applying constitutional or statutory implementations of principles of legality stronger than those applying in international law': Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2009), 398.

[24] Nobody seriously suggested that the events should be qualified as genocide.

[25] *1993. évi XC. Törvény az 1956. Októberi Forradalom és Szabadságharc Során Elkövetett Egyes Bűncselekményekkel Kapcsolatos Eljárásról* [Law No XC. of 1993 on the Procedure Applicable for Certain Criminal Offences Committed in the Course of the Revolution and War of Independence of 1956] (Hungary) Article 1, author's translation.

[26] A Magyar Köztársaság Alkotmánybírósága [Constitutional Court of the Republic of Hungary], No 36/1996, 4 September 1996. Section II. (1). (Decision No 36/1996) Péter Kovács translation, 'Correspondents' Reports—Hungary', *Yearbook of International Humanitarian Law*, *1* (1998), 453.

[27] Kovács, 454.

This new interpretation precipitated a change of focus: instead of investigating the most significant political crimes of the Communist era, the criminal proceedings concentrated on war crimes and crimes against humanity allegedly committed during the 1956 Hungarian revolution and attempted to establish criminal responsibility based on international law. The prosecutors investigated forty potential cases and finally issued indictments in nine cases. However, only three persons were found guilty.[28]

(II) A Tragedy of Errors—Critical Analysis of the Hungarian Jurisprudence

In the following section, I will analyse the attempts of the Hungarian judiciary to apply international criminal law to the events of the 1956 revolution. Firstly, I present the applicable legal framework at the time of the commission of the acts,[29] that is, the regulation of war crimes and crimes against humanity. In this regard, I will focus on the most problematic questions addressed by the Hungarian courts. Subsequently, I will turn to the actual judgments and will try to explain why the Hungarian judiciary came to a flawed conclusion.

(1) War crimes

It is uncontroversial to say that by World War II international law had attached individual criminal responsibility to serious violations of the laws and customs of war in international armed conflict.[30] After the war, most of these offences were codified in the grave breaches provisions of the 1949 Geneva Conventions.[31] The legal regulation of internal armed conflicts, however, was traditionally considered to belong to the domaine réservé of sovereign states. Accordingly, governments were given complete discretion to deal with rebels threatening their rule. The rules of the laws of armed conflict only became applicable when the state accorded recognition of insurgency or belligerency to the rebels in a high-intensity civil

[28] For more details see Hoffmann, above n 1, 735–53.

[29] As it is demonstrated below, the Hungarian courts did not fully comply with the principle of intertemporality, which provides that 'a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at time when a dispute in regard to it arises or fails to be settled': *Island of Palmas (United States of America v Netherlands) (Decision)* (Permanent Court of Arbitration) (1928) 2 RIAA 829, 845.

[30] See Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), 47–62; Gerhard Werle, *Principles of International Criminal Law* (TMC Asser, 2009, 2nd edn), 344–54.

[31] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) Article 50; Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) Article 51; Geneva Convention relative to the Treatment of Prisoners of War, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) Article 130; Geneva Convention relative to the Protection of Civilian Persons in Time of War, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), Article 147.

war, accepting them as equal belligerents.[32] Outside of this situation, the concept of international legal regulation pertaining to domestic armed conflicts was unintelligible.

Yet Common Article 3 of the 1949 Geneva Conventions enumerated a number of elementary norms applicable to 'armed conflicts not of an international character'. Even though this rudimentary framework was certainly revolutionary in the sense of extending the protection of some elementary norms of international humanitarian law to non-international armed conflicts, the very definition of the notion of non-international armed conflict was conspicuously missing from the provision. This gave rise to much speculation about its scope of application. During the 1949 Diplomatic Conference, most states intended to set a very high threshold of application for Common Article 3, similar to the classic conditions of recognition of belligerency.[33] It can be concluded that the drafters conceived the term 'armed conflict not of an international character' to refer to 'situations of civil war, i.e. non-international armed conflict reaching the threshold of intensity associated with contemporaneous conventional international warfare'.[34]

In legal literature a number of criteria were adduced for the determination of the existence of non-international armed conflict, the most frequently mentioned ones being a certain level of organization and intensity of violence.[35] Thus, Schindler suggests that hostilities have to be conducted by force of arms and exhibit such intensity that, as a rule, the government is compelled to employ its armed forces against the insurgents instead of mere police forces and that insurgents have to exhibit a minimum amount of organization, ie to be under responsible command and be capable of meeting minimal humanitarian requirements.[36] Draper likewise emphasized that the ability of insurgents to comply with their obligations under Common Article 3 not only implies a modicum of organization, but also a degree of territorial control.[37]

In similar fashion, the International Committee of the Red Cross (ICRC) proposed during the consultations about the text of Additional Protocol II to the 1949 Geneva Conventions a draft definition of non-international armed conflict that

[32] Hersch Lauterpacht, *Recognition in International Law* (Cambridge: Cambridge University Press, 1947), 172–85.

[33] For a thorough perusal of the travaux préparatoires see Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge: CUP, 2010), 27–49.

[34] Cullen, above n 33, 37.

[35] In fact, many experts argued that the threshold of applicability of Common Article 3 was actually high. In 1993, a UN Commission of Experts for instance stated that 'The [Geneva] Conventions were designed to cover inter-State wars and large-scale civil wars': See *Report of the Secretary-General pursuant to Article 5 of Security Council Resolution 837 (1993)*, 3 May 1993, UN Doc. S/26351 [9].

[36] Dietrich Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Additional Protocols', *Recueil des Courts*, *163* (1979), 147. Draper suggests that an Article 3 conflict takes place whenever 'sustained troop action is undertaken against rebels, even though the rebel organisation and control of any area is minimal, and the situation is such that the police are not able to enforce the criminal law in a particular area by reason of rebel action'. Gerald I.A.D. Draper, 'The Geneva Conventions of 1949', *Recueil des Cours*, *114* (1965), 89–90.

[37] Draper, above n 36, 90.

it considered sufficiently general and flexible to apply to all situations based on the criteria of 'the existence of a collective confrontation "between armed forces or armed groups", under a responsible command, which is to say with a minimum level of organisation'.[38]

The jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) also maintained that a certain level of organization and intensity of violence were indispensable for the determination of a non-international armed conflict. In the *Tadić* case the Appeals Chamber submitted that '[a]n armed conflict exists whenever there is … protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.[39] This definition has generally been accepted as a restatement of customary international law, consistently reiterated by the ICTY,[40] International Criminal Tribunal for Rwanda,[41] the International Criminal Court,[42] internationalized criminal courts,[43] military law manuals[44] and international expert reports.[45] The customary status of the *Tadić* definition is also buttressed by its inclusion in Article 8(2) (f) of the Rome Statute of the International Criminal Court.[46] Still, as pointed out above, contemporary consensus points to the conclusion that the threshold of non-international armed conflict was significantly higher in 1956 than it is today.

It must also be kept in mind that individual criminal responsibility does not automatically follow from the commission of a proscribed act. Before the 1990s,

[38] Sylvie Junod, 'Additional Protocol II: History and Scope (1982–1983)', *The American University Law Review*, *33* (1983), 32.

[39] *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) [70] (*Tadić Interlocutory Appeals*).

[40] See, *inter alia*, *Prosecutor v Delalić et al (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-96-21-T, 16 November 1998) [183]*; Prosecutor v Kordić and Čerkez (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-95-14/2-T, 26 February 2001) (*Kordić Judgment*) [24]; *Prosecutor v Kunarac et al (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-23&IT-96-23/1-A, 12 June 2002) (*Kunarac Appeal*) [56]; *Prosecutor v Milutinović et al (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-05-87-T, 26 February 2009) [125]; *Prosecutor v Gotovina et al (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-06-90-T, 15 April 2011) [1674].

[41] *Prosecutor v Akayesu (Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [619]; *Prosecutor v Rutaganda, (Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-3-T, 6 December 1999) [92].

[42] *Prosecutor v Lubanga (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/06, 29 January 2007) [233].

[43] *Prosecutor v Eav (Judgment)* (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case No. 001/18-07-2007/ECCC/TC, 26 July 2010) (*Eav Trial*) [412].

[44] UK Ministry of Defence, *Manual of the Law of Armed Conflict* (Oxford: OUP, 2004), 29; Yoram Dinstein, Charles H.B. Garraway and Michael N. Schmitt, *The Manual on the Law of Non-International Armed Conflict with Commentary* (San Remo, 2006), 2.

[45] International Commission of Inquiry on Darfur, *Report to the United Nations Secretary-General pursuant to Security Council Resolution 1564 of 18 September 2004*, UN Doc. S/2005/60 (25 January 2005) [74]; Commission of Inquiry on Lebanon, *Report Pursuant to Human Rights Council Resolution S-2/1*, UN Doc. A/HRC/3/2 (23 November 2006) [51]; International Commission of Inquiry, *Report on Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya*, A/HRC/17/44 (1 June 2011) [63].

[46] Article 8(2)(f) provides that '[p]aragraph 2 (e) applies to armed conflicts not of an international character … that take place in the territory of a State when there is protracted armed conflict between

almost unanimous opinion held that the concept of war crimes was confined to the field of international armed conflicts.[47] The acceptance of individual criminal responsibility for crimes committed in non-international armed conflict was largely due to the ICTY's revolutionary 1995 *Tadić Interlocutory Appeals* decision,[48] which changed the perception of the international community on this question.[49] Consequently, it can be concluded that international law did not criminalize violations of international humanitarian law committed during a non-international armed conflict as war crimes in 1956.

(2) Crimes against humanity

The category of crimes against humanity originally aimed to ensure that inhumane acts committed against the civilian population in connection with war were punished. Hence, it served as an 'accompanying' or 'accessory' crime to either crimes against peace or war crimes.[50] In effect, the International Military Tribunal treated the concept as an extension of war crimes.[51]

Nevertheless, some crucial elements of this category—and especially its precise content in 1956—are subject to contradictory interpretations. The Charter of the International Military Tribunal required a nexus between crimes against humanity and other crimes within the jurisdiction of the Tribunal, that is, it linked crimes against humanity to an international armed conflict. Even though it is generally accepted that contemporary customary international law no longer requires this connection,[52] there is disagreement as to when this bond was severed. While the European Court of Human Rights (ECtHR) contended in the *Korbély* case that nexus with an armed conflict 'may no longer have been relevant by 1956' for the determination of crimes against humanity,[53] other authorities suggest that this transformation took place at a later date.[54]

governmental authorities and organized armed groups or between such groups.' Rome Statute of the International Criminal Court, opened for signature 17 July 1988, 2187 UNTS 90 (entered into force 1 July 2002) Article 8(2)(f) (ICC Statute).

47 For a review of contemporary jurisprudence see Tamás Hoffmann, 'The Gentle Humaniser of Humanitarian Law—Antonio Cassese and the Creation of the Customary Law of Non-international Armed Conflict', in Carsten Stahn and Larissa van den Herik (eds), *Future Perspectives on International Criminal Justice* (The Hague: TMC Asser, 2010), 58, 64 fn 59–60.

48 *Tadić Interlocutory Appeals,* [128–36].

49 Hoffmann, above n 47, 63–80.

50 Egon Schwelb, 'Crimes against Humanity', *British Yearbook of International Law*, *23* (1946), 181.

51 See especially Cherif M. Bassiouni, *Crimes against Humanity—Historical Evolution and Contemporary Application* (Cambridge: CUP, 2011), 136–44.

52 Steven R. Ratner, Jason S. Abrams and James L. Bischoff, *Accountability for Human Rights Atrocities in International Law—Beyond the Nuremberg Legacy* (Oxford: OUP, 3rd edn, 2009), 59.

53 *Korbély v Hungary* (European Court of Human Rights, Grand Chamber, Application No 9174/02, 19 September 2008) (*Korbély Decision*) [82]. It must be pointed out, however, that even this uncertain statement was merely based on the unadopted Draft Code of Offences against the Peace and Security of Mankind of the International Law Commission and the scholarship of two authors. Moreover, one of the cited authors, Egon Schwelb, did not actually make the claim attributed to him by the Court. See Schwelb, 'Crimes against Humanity', above n 50, 211.

54 Generally, most authors agree that the independence of crimes against humanity from international armed conflict was the outcome of a gradual evolution. Antonio Cassese, *International Criminal*

Another contentious issue is the substance of the contextual elements of the crime. There is general agreement that crimes against humanity require 'widespread or systematic' commission in which 'the hallmark of "systematic" is the high degree of organisation, and that features such as patterns, continuous commission, use of resources, planning, and political objectives are important factors'.[55] Widespread commission, on the other hand, is the quantitative aspect of crimes against humanity, which typically denotes numerous inhumane acts,[56] but might also be satisfied by a singular massive act of extraordinary magnitude.[57] However, the jurisprudence of international criminal courts and legal doctrine are divided over whether the attack against the civilian population must be carried out in pursuance of a state plan or policy. Since the adoption of the *Kunarac* judgment, the ad hoc tribunals have consistently rejected the existence of such an underlying plan or policy under customary international law,[58] even though arguably the evidence adduced by the Tribunal to support this conclusion was far from satisfactory.[59] While certain authors accept this proposition,[60] the jurisprudence of the Nuremberg trials suggests that the post-war interpretation of crimes against humanity linked the commission of such acts to government organization or approval. In the *Alstötter* case, the US Military Tribunal thus pronounced that:

crimes against humanity as defined in C.C. Law 10 must be strictly construed to exclude isolated cases of atrocities or persecutions whether committed by private individuals or by a governmental authority. As we construe it, that section provides for the punishment

Law (Oxford: OUP, 2003), 73. Based on a thorough perusal of the relevant international legal instruments, Ford argues that the tipping point probably occurred between 1968 and 1984: Stuart Ford, 'Crimes Against Humanity at the Extraordinary Chambers in the Courts of Cambodia: Is a Connection with Armed Conflict Required?', *UCLA Pacific Basin Law Journal*, *24* (2007), 182–3. Ratner, Abrams and Bischoff suggest that this transformation was completed by 1975 but admit that 'the issue is certainly open to debate': Ratner, Abrams and Bischoff, above n 52, 323.

[55] Robert Cryer et al, *An Introduction to International Criminal Law and Procedure* (Cambridge: CUP, 2nd edn, 2010), 237.

[56] Cassese points out that 'Crimes against humanity (CAH) have always been conceived, from the beginning, as crimes on an enormous scale. While early codifications of CAH did not explicitly contain a requirement that the attack on the civilian population be on a large scale, it was understood that this law was intended to address massive attacks': Antonio Cassese et al, *International Criminal Law—Cases and Commentary* (Oxford: OUP, 2011), 180.

[57] *Prosecutor v Blaškić* (*Judgment*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-94-15-T, 3 March 2000) [206]; *Kordić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-95-14/2-T, 26 February 2001) [176].

[58] In the *Kunarac* case the Appeals Chamber pronounced that '[t]here was nothing in . . . customary international law at the time of the alleged attacks which required proof of the existence of a plan or policy to commit these crimes': *Kunarac Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-23&IT-96-23/1-A, 12 June 2002) [98]. Repeated *inter alia* in *Prosecutor v Krstić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-33-A, 19 April 2004) [225]; *Prosecutor v Semanza (Judgment)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-20-A, 20 May 2005) [269]. This finding was recently quoted with approval by the Extraordinary Chambers in the Courts of Cambodia. See *Eav Trial* (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case No. 001/18-07-2007/ECCC/TC, 26 July 2010) [412].

[59] William Schabas, 'State Policy as an Element of International Crimes', *Journal of Criminal Law & Criminology*, *98* (2008), 981.

[60] Werle, above n 30, 299.

of crimes committed against German nationals only where there is proof of conscious participation in systematic governmentally organised or approved procedures, amounting to atrocities and offences of that kind specified in the act and committed against populations.[61]

Recently the ECtHR also deemed it important to analyse whether 'the particular act committed by the applicant was to be regarded as forming part of this state policy, such as to bring it within the sphere of crimes against humanity, as this notion was to be understood in 1956'.[62] Similarly, the Statute of the International Criminal Court prescribes that ' "[a]ttack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack'.[63]

The codification of the policy requirement by the Statute of the International Criminal Court might be seen as 'a weighty piece of evidence' contrary to the position of the ad hoc tribunals.[64] Nevertheless, even though the requirement of state plan or policy is disputed, there is widespread consensus that it is necessary that the act committed by the accused 'objectively falls within the broader attack, and that the accused was aware of this broader context'.[65] Accordingly, in order to commit the crime the acts of the accused must form part of the broader course of conduct.[66]

(3) Hungarian jurisprudence

The interpretative frame of reference for the application of international criminal law to the events of 1956 was set out by the Hungarian Constitutional Court. The Court pronounced that grave breaches of Geneva Convention IV and 'prohibited acts in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties as determined by common Article 3' are not subject to statutory limitations due to the 1968 UN Convention on the Non-Applicability of Statutory Limitations.[67] The Constitutional Court opined that:

> Acts defined in Article 3 common to the Geneva Conventions constitute crimes against humanity... Consequently the punishability of the acts prescribed in common Article 3 of the Geneva Conventions will not lapse, either. Provided these acts would not fall under the scope of war crimes defined in Article 1(a) of the New York Convention—either due to the

[61] *USA v Alstötter et al.* (Judgment) 14 ILR 274, 320 (Military Tribunal III, 3–4 December 1947).
[62] *Korbély Decision* (European Court of Human Rights, Grand Chamber, Application No 9174/02, 19 September 2008) [84].
[63] *ICC Statute,* Article 7(2)(a).
[64] Claus Kress, 'On the Outer Limits of Crimes against Humanity: The Concept of Organisation within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision', *Leiden Journal of International Law*, *23* (2010), 870.
[65] *Prosecutor v Tadić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) [271].
[66] Cryer et al, above n 55, 237.
[67] Decision No 53/1993, section II.

victim group or the actual conduct—they would still qualify as crimes against humanity defined in Article 1(b).[68]

The Court's reasoning in this regard equates the category of crimes against humanity with violations committed in non-international armed conflict (ie war crimes) without clearly justifying this novel and unusual interpretation. The decision relies solely on the statement of the International Court of Justice in the *Nicaragua* case that the provisions of Common Article 3 embody 'elementary considerations of humanity'[69] and claims that '[i]n defining crimes against humanity, paragraph 47 of the Report on the Statute of the ICTY also makes reference to Common Article 3'.[70] In reality, however, the International Court of Justice qualified the transgressions in the case at hand not as crimes against humanity but as violations of humanitarian law, while the Secretary-General's Report simply affirms that crimes against humanity are prohibited 'regardless of whether they are committed in an armed conflict, international or internal in character' without alluding to a link between the violation of Common Article 3 and crimes against humanity.[71] The Constitutional Court thus stretched the concept of crimes against humanity to the breaking point in an attempt to remedy the absence of Hungarian codification of this core crime by reading it into the category of war crimes.[72] Only through this contorted approach could the Constitutional Court maintain that 'the great majority of... crimes against humanity were punishable also under the Hungarian criminal law valid in 1956'.[73]

However contentious this decision might have been, it has become the template for Hungarian criminal courts. Therefore the only crucial question in the ensuing criminal proceedings that remained was the determination of the existence of a non-international armed conflict. Still, Hungarian courts were deeply divided. Although it became accepted that the events following the Soviet intervention on 4 November 1956 constituted an international armed conflict, there was disagreement between the courts on the question of whether the hostilities in the period between 23 October and 4 November reached the threshold of non-international armed conflict.

This problem seemed to have been resolved when the Supreme Court decided in 1998 that in the examined period the hostilities did not reach the level of non-international armed conflict.[74] The Court ruled that the material scope of application of Additional Protocol II to the 1949 *Geneva Conventions*[75] should be

[68] Decision No 53/1993, section IV(4)(b).

[69] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Judgment)* [1986] ICJ Rep 14, 114 [218].

[70] Decision No 53/1993, section IV(4)(b).

[71] See Boutros Boutros-Ghali, Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), UN Doc. S/25704 (3 May 1993) [47].

[72] The Hungarian Criminal Code does not explicitly criminalize violations of humanitarian law committed in a non-international armed conflict but the provisions on war crimes have been interpreted since the 1990s to also include situations of internal conflicts.

[73] Decision No 36/1996, section II(2).

[74] Legfelsőbb Bíróság [Hungarian Supreme Court] No. 1344/1998/3, 5 November 1998.

[75] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978).

used to ascertain the existence of non-international armed conflict. Article 1 of Additional Protocol II prescribes a high threshold: it requires territorial control and high level of organization by the non-state armed groups, namely responsible command and the ability to carry out and sustain concerted military operations.

Yet the Review Bench of the Supreme Court overturned this decision and adopted a much broader interpretation that became the basis of all further decisions of the Hungarian judiciary in the 'volley cases'. The Court argued that:

> The community of nations sought to protect protected persons by Article 3 common to the Geneva Conventions in cases of civil war when the population of the state and the armed forces of the state are facing each other. No further criteria are specified in the text of the norm. Requiring further criteria might endanger the humanitarian character of the conventions . . . The Commentary to the 1949 Geneva Conventions edited by the International Committee of the Red Cross provides a tool for the interpretation of the notion of an armed conflict of non-international character (Commentaire IV. p. 23). Accordingly, de facto hostilities or the use of the armed forces of the state amount to a conflict of non-international character . . .
>
> Independently of the findings of fact, it is common knowledge that, from 23 October 1956 onwards, the central power of the dictatorship made use of its armed forces against the unarmed population engaged in peaceful demonstrations and against armed revolutionary groups whose organisation was in progress. During this time, the armed forces employed significant military equipment, such as tanks and aircrafts, and their activities against the population opposed to the regime spread over the whole country. In practical terms, they waged war against the overwhelming majority of the population.[76]

The reasoning is noteworthy for several reasons. First of all, the Supreme Court apparently did not consider it crucial to determine the customary law definition of non-international armed conflict as it existed in 1956; it simply treated the question as if it was the outcome of a purposive interpretation of Common Article 3. Such reasoning is reminiscent of the jurisprudence of the ad hoc Tribunals, which attempted to 'humanise humanitarian law' by adopting innovative interpretations aiming at expanding the protective scope of humanitarian law.[77] However, it is suggested that a criminal court—in line with the principle of strict construction—should adopt the interpretation of a norm that is the most favourable to the accused. In other words, the *in dubio pro reo* principle should prevail over the *in dubio pro humanitate* approach.

Even so, while the Court justifies the finding that the 1956 revolution was a non-international armed conflict (at least until 4 November 1956) by invoking the necessity of extending the humanitarian protection to the broadest possible scope, it gave a definition that on a narrow reading accepts armed hostilities as a non-international armed conflict only if they involve confrontation between the overwhelming majority of the population and the government—thus possibly excluding more isolated incidents. In effect, this definition simultaneously expands and limits the notion of non-international armed conflict spelt out in *Tadić*. The Hungarian Supreme

[76] Legfelsőbb Bíróság [Hungarian Supreme Court] No X. 713/1999/3, 28 June 1999.

[77] Theodor Meron, 'The Humanisation of Humanitarian Law', *American Journal of International Law*, *94* (2000), 239.

Court did not establish any level of organization for the non-state armed groups but demanded an exceptionally high requirement of intensity in the form of the participation of the predominance of the population. The use of the ICRC Commentary as an interpretative aid is also unconvincing. Even though the views of the only international organization specifically entrusted with a role in developing international humanitarian law holds a certain persuasive authority, it cannot contradict the will of the international community. Moreover, even the broad interpretation of the concept of non-international armed conflict proposed by the International Community of the Red Cross is significantly different from the Hungarian Supreme Court's opinion. Although the Commentary sought to lower the threshold of the applicability of Common Article 3, it still maintained the requirement of a certain level of organization.[78]

The Constitutional Court and the Supreme Court together set the path for the criminal courts. Every criminal act before 4 November 1956 was to be regarded as a violation of Common Article 3 and hence a crime against humanity, while crimes committed after the critical date amounted to war crimes. Yet the confusion of war crimes and crimes against humanity was exacerbated when, in certain cases, the courts justified their conclusions with reference to other rules of Geneva Convention IV—particularly the grave breach regime. In the *Kecskemét* case, the Supreme Court held that the violation of Common Article 3 amounted to a grave breach specified in Article 147 of Geneva Convention IV and consequently a crime against humanity.[79] In the *Tiszakécske* volley case the judgment declared that the peaceful demonstrators who fell victim to volleys fired from aeroplanes were protected persons under Article 3(1) of the Convention since they did not take direct part in hostilities, and that their intentional killing was thus a breach of Article 3(1)(a) and a crime against humanity.[80] The most confusing judgment, however, was passed by the Budapest Metropolitan Court, which found that the shooting at the Kossuth Square on 25 October 1956 should be classified with reference to Articles 2, 3, 4 and 6 of Geneva Convention IV, making the criminal acts grave breaches under Articles 146 and 147 and thus crimes against humanity.[81]

The Hungarian judiciary was given a final chance to remedy its flawed application of international law. The ECtHR determined that the Hungarian Supreme Court's judgment violated the principle of non-retroactivity.[82] It rightly pointed out that

> the [Hungarian] criminal courts focused on the question whether common Article 3 was to be applied alone or in conjunction with Protocol II. Yet this issue concerns only the definition of the categories of persons who are protected by common Article 3 and/or Protocol II

[78] Jean Pictet (ed), *Commentary—IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: International Committee of the Red Cross, 1958), 35–6.

[79] Legfelsőbb Bíróság [Hungarian Supreme Court] Case No I.1.534/1999/5, 13 September 2000.

[80] Legfelsőbb Bíróság [Hungarian Supreme Court] Case No I.1.535/1999/5, 20 September 2000.

[81] Fővárosi Bíróság [Budapest Metropolitan Court] Case No 13.B.563/2001/18, 2 October 2002.

[82] *Korbély Decision* (European Court of Human Rights, Grand Chamber, Application No 9174/02, 19 September 2008), [95].

and the question whether the victim of the applicant's shooting belonged to one of them; it has no bearing on whether the prohibited actions set out in common Article 3 are to be considered to constitute, as such, crimes against humanity.[83]

Consequently, the Supreme Court had to revisit the question. Yet, while the *Korbély* Review Bench seemingly made an effort to heed the analysis of the ECtHR by analysing whether the alleged criminal act formed part of a widespread and systematic attack against the civilian population, it concluded that the concept of armed conflict incorporates the widespread and systematic attack requirement and that the accused's status as a captain in the Hungarian army established a direct connection to state policy.[84] The Bench did not even attempt to prove the existence of widespread and systematic attack in furtherance of state policy, holding instead that a professional soldier at the time of the revolution was necessarily engaged in the commission of crimes against humanity.

It appears that such an outcome was almost unavoidable. In continental European jurisdictions, there is a natural reticence about the application of international law, and Hungarian courts are no exceptions in this respect. The judges' diffidence can often be traced back to psychological factors. Continental legal education focuses upon domestic and black-letter law, which explains the insecurity about the determination and application of international law.[85] The use of customary international law in domestic criminal proceedings is especially problematic. In the continental legal tradition, it is by no means obvious that customary norms can be used to establish criminal responsibility since the often vague content of a customary norm is difficult to reconcile with the requirements of foreseeability and strict construction of criminal law norms.[86] Moreover, as a result of the *jura novit curia* principle, continental courts generally do not have recourse to international law experts to assist them in the determination of the applicable rules of international law. They are presumed to be aware of the content of every norm in the entire legal system—including the rules of international law. Inevitably, in such circumstances domestic courts tend to opt for a continuity of interpretation within their jurisdiction, which can result in construing international law in conformity with domestic legal norms. For instance, in the *Touvier* case, 'the definition of a crime against humanity depended on that adopted by French domestic law, as it has been consistently interpreted by the Cour de Cassation'.[87]

[83] *Korbély Decision*, above n 82, [80]. For an analysis of this question see Károly Bárd, 'The Difficulties of Writing the Past Through Law—Historical Trials Revisited at the European Court of Human Rights', *International Review of Penal Law*, *81* (2010), 42.

[84] Legfelsőbb Bíróság [Hungarian Supreme Court] Case No X. 1.055/2008/5, 9 February 2009.

[85] Jan Wouters, 'Customary International Law Before National Courts: Some Reflections From a Continental European Perspective', *Non-State Actors and International Law*, *4* (2004), 31–2.

[86] Mark Klamberg, 'International Criminal Law in Swedish Courts: The Principle of Legality in the Arklöv Case', *International Criminal Law Review*, *9* (2009), 405.

[87] Simonetta Stirling-Zanda, 'The Determination of Customary International Law in European Courts (France, Germany, Italy, The Netherlands, Spain, Switzerland)', *Non-State Actors and International Law*, *4* (2004), 9.

Even though re-characterization of national crimes as crimes under international law has been accepted in a number of jurisdictions,[88] the court in question must still prove that the conduct has fulfilled all the criteria required by international law at the time of the commission of the act. However, in lieu of resorting to the challenging task of determining the exact scope of crimes against humanity under international law, it seems that the Hungarian courts simply deferred to Hungarian domestic law and interpreted the category of crimes against humanity as identical to the crimes defined in Chapter XI of the Hungarian Criminal Code, entitled 'Crimes against humanity'.[89] However, the Hungarian legal system has failed to codify crimes against humanity as defined under international law, and Chapter XI of the Criminal Code only proscribes war crimes and crimes against peace. This eventually resulted in substituting crimes against humanity with war crimes committed in non-international armed conflict.

Metalegal influences could have also played a role in the final outcome. Benvenisti argues that 'the method of inquiry used by a national court in examining the existence of a custom is likely to reflect its national affiliation'.[90] In the present case, the casual treatment of international law might suggest that the courts treated the determination of guilt of the accused as a retrospective affirmation of the legitimacy of the 1956 revolution. Tellingly, the ECtHR was recently criticized by a Hungarian author for not taking judicial notice of the fact that the communist regime used widespread and systematic violence against the people revolting against its oppressors. In this interpretation, the *Korbély* decision amounts to disputing the very existence of the revolution.[91]

(III) Conclusion—Back to Square One?

In Hungary, the peaceful, negotiated transition from communism to democracy resulted in legal and constitutional continuity with the totalitarian predecessor,[92] preventing a real rupture with the past.[93] The Constitutional Court emphasized this continuity by pronouncing that:

> The politically revolutionary changes adopted by the Constitution and the fundamental laws were all enacted in a procedurally impeccable manner, in full compliance with the

[88] Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: CUP, 2009), 276–7.

[89] In fact, the Hungarian term 'emberiség elleni bűncselekmény' can be translated either as crimes against humanity or crimes against mankind.

[90] Eyal Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts', *European Journal of International Law*, *4* (1993), 165.

[91] Péter Hack, 'A Korbély-ügy—A Visszaható Hatály Tilalma és az Emberiség Elleni Bűncselekmények' [The Korbély Case—The Prohibition of Retroactivity and Crimes against Humanity], *Jogesetek Magyarázata*, *1* (2010), 78–9.

[92] Uitz, above n 4, 289. The first democratically elected prime minister, József Antall once memorably replied to criticisms that the process of 'decommunization' was not sufficiently thorough that: 'You should have made a revolution!'

[93] Rosenfeld pointed out that in case of a violent rupture with the past 'the demands of political justice might be reconciled with those of constitutionalism by confining the operation of political justice to

old legal system's regulations of the power to legislate, thereby gaining their binding force. The old law retained its validity. With respect to its validity, there is no distinction between 'pre-Constitution' and 'post-Constitution' law.[94]

The Constitutional Court's decision was based on an interpretation of the concept of rule of law as security. However, Kis persuasively argues that the Constitutional Court's jurisprudence was hitherto characterized by a moral reading of the principle of constitutionality and the sudden turn to a formal reading of the principle of legality was by no means inevitable.[95] This change of heart was due to the Court's belief in the necessity of reaffirming that the legal order of the communist era was valid.[96] Kok suggests that this approach was 'caused by the fact that in Hungary, the repression, apart from the period from 1956 to 1963, was considerably less severe than that in Czechoslovakia and former Eastern Germany'.[97] Yet such formal reading of the rule of law principle inevitably led to repercussions. In certain segments of society it resulted in 'widespread questioning of the whole existing establishment, including the rule of law and the judicial review of majoritarian decision-making'.[98]

In these circumstances, international criminal law was used to bypass the statute of limitations. However, international criminal law proved a poor substitute for political justice. As with the other Central and Eastern European countries, prosecutions under international law have produced very few tangible results.[99] The dearth of convictions spurred the right-wing government in 2010 to return to 'ordinary criminal law' in dealing with the past. An amendment of the Criminal Code proscribed 'denying, questioning or trivializing genocide and other crimes against humanity committed by national socialist or communist regimes'.[100]

In similar vein, the preamble to the newly adopted Fundamental Law of Hungary (in effect from 1 January 2012)—the so-called 'National Avowal'—raised the prospect of reopening the prosecution of communist crimes by denying legal continuity with the previous regime. The Fundamental Law pronounces that:

> We deny the any statute of limitations for the inhuman crimes committed against the Hungarian nation and its citizens under the national socialist and communist dictatorships.
>
> We do not recognise the communist constitution of 1949, since it was the basis for tyrannical rule; therefore we proclaim it to be invalid…
>
> We date the restoration of our country's self-determination, lost on the nineteenth day of March 1944, from the second day of May 1990, when the first freely elected body of

the revolutionary period separating the ancient regime from the new constitutional order': Michael Rosenfeld, 'Dilemmas of Justice', *East European Constitutional Law Review*, *1* (1992), 20.

94 Decision 11/1992, section V.

95 János Kis, 'Alkotmánybíróság a mérlegen (III. rész)' [Constitutional Court on the Scales (Part III)], *Fundamentum*, *4* (2000), 35.

96 Ruti G. Teitel, *Transitional Justice* (Oxford: OUP, 2000), 15.

97 Ruth Kok, *Statutory Limitations in International Criminal Law* (Boston, MA and Leiden: Martinus Nijhoff, 2007), 210.

98 Morvai, above n 9, 33.

99 Cherif M. Bassiouni, *International Criminal Law*, Vol 3 (Boston, MA and Leiden: Brill Academic Publisher, 2008), 5.

100 Criminal Code, Article 296(c), author's translation.

popular representation was formed. We shall consider this date to be the beginning of our country's new democracy and constitutional order.[101]

Coincidentally, at the time of the drafting of the Fundamental Law, the Office of the General Prosecutor declined to initiate proceedings against the last living communist leader, Béla Biszku, who had played a key role as a Minister of Interior between 1957 and 1961 in the reprisals against the participants of the 1956 revolution. The Prosecution heeded the settled jurisprudence of the Supreme Court and restricted its analysis to the applicability of Geneva Convention IV, concluding that the acts alleged to have been committed by Biszku did not amount to grave breaches of the Convention and therefore were subject to the statute of limitations.[102] At the same time, however, Biszku was charged as the first person to violate the new amendment of the Criminal Code for publicly asserting that the 1956 revolution was a counterrevolution and that the sentences against revolutionaries, including about 235 death sentences, were justified.

Yet the Hungarian Parliament attempted one final time to reopen the prosecution of international crimes committed in connection to the 1956 revolution. With the avowed intention of recommencing the Biszku case, a new act translated the definition of crimes against humanity of the Nuremberg Statute into Hungarian and explicitly authorized the Hungarian courts to apply them.[103] However, far from solving the predicament of the Hungarian judiciary, the new law actually compounded it, since it did not define the contextual elements of crimes against humanity and also criminalized the violation of Common Article 3 of the Geneva Conventions, in contravention to the *nullum crimen* principle.[104]

Worse still, the law introduced the category of 'communist crimes' and declared that the commission or aiding and abetting of serious crimes such as voluntary manslaughter, assault, torture, unlawful detention and coercive interrogation is not subject to prescription when committed on behalf, with the consent of, or in the interest of the party state. In the guise of enforcing international criminal law, this provision effectively replicates the regulation that was found unconstitutional by the Hungarian Constitutional Court in the first half of the 1990s.

In conclusion, Hungary seems to have abandoned its experiment with international criminal justice in a domestic setting and turned once again to a political solution.

[101] Magyarország Alaptörvénye [The Fundamental Law of Hungary], http://www.kormany.hu/download/4/c3/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf (accessed 15 April 2013).

[102] Legfőbb Ügyészség [Office of the General Prosecutor] No. NF. 10718/2010/5-I., 17 December 2010.

[103] *2011. évi CCX. Törvény az Emberiesség Elleni Bûncselekmények Büntetendőségéről és Elévülésének Kizárásáról, valamint a Kommunista Diktatúrában Elkövetett Egyes Bûncselekmények Üldözéséről* [Law No CCX of 2011 on the Punishability and the Exclusion of the Statute of Limitations of Crimes Against Humanity and on the Prosecution of Certain Crimes Committed During the Communist Dictatorship] (Hungary).

[104] See more in detail Tamás Hoffmann (2011), 'A Nemzetközi Szokásjog Szerepe a Magyar Büntetőbíróságok Joggyakorlatának Tükrében' [The Role of International Customary Law in the Jurisprudence of the Hungarian Criminal Courts], *Jogelméleti Szemle* <http://jesz.ajk.elte.hu/hoffmann48.html> (accessed 28 February 2013).

This choice, however, has inevitably divided the people along party lines and effectively prevented any real prospects of finally facing the legacy of the communist past. If there is any moral in the story—apart from the necessity of reforming the legal education of judges—it is that international criminal law cannot in itself substitute for the ultimately political project of confronting past wrongs and trying to achieve national reconciliation. As long as the society is not ready to come to terms with its past, the application of international law will only serve as a fig-leaf to conceal deep-rooted enmities.

12

Competing Histories: Soviet War Crimes in the Baltic States

Rain Liivoja[*]

Most contributions to this volume tell untold stories about war crimes trials. This chapter, however, focuses on a few trials that attempt to tell untold stories. In other words, it is not the trials themselves that have been hidden in the mist of history, but rather the offences that they deal with. My aim here is to provide a brief comment on the efforts that the three Baltic states—Estonia, Latvia and Lithuania—have made to prosecute offences against international law committed in their territories by the Soviet authorities during and after World War II. This discussion highlights the storytelling or history-writing function that trials of international crimes often have. The situation of the Baltic states illustrates particularly vividly what happens if the historical record produced by such trials is in conflict with existing historical paradigms.

(I) Background

The Baltic states, as well as Finland, were part of the Russian Empire until the Russian Revolution of 1917. To cut a long story short,[1] in the wake of the collapse of the Tsarist Government, Finland, Estonia, Latvia and Lithuania declared independence; they waged successful wars of independence against Soviet Russia, which, in peace treaties concluded in 1920, recognized the new states and disclaimed any rights to their territory.[2]

* I am grateful to Lauri Mälksoo and Gerry Simpson for helpful comments on an earlier draft. The responsibility for the final text, however, is mine alone.

[1] For more detail, see Andrejs Plakans, *A Concise History of the Baltic States* (Cambridge: Cambridge University Press, 2011), particularly 293–307, and Andres Kasekamp, *A History of the Baltic States* (Basingstoke: Palgrave Macmillan, 2010), 95–105.

[2] See Treaty of Peace, Estonia–Russian SFSR, signed at Dorpat [Tartu], 2 February 1920, in force 30 March 1920, 11 LNTS 30; Treaty of Peace, Lithuania–Russian SFSR, signed at Moscow, 12 July 1920, 3 LNTS 106; Treaty of Peace, Latvia–Russian SFSR, signed at Riga, 11 August 1920, 63/2 LNTS 195; Treaty of Peace, Finland–Russian SFSR, signed at Dorpat [Tartu], 14 October 1920, 3 LNTS 5.

On 23 August 1939, the Reich Minister for Foreign Affairs Joachim von Ribbentrop and the People's Commissar for Foreign Affairs Vyacheslav Molotov signed the Nazi–Soviet Treaty of Non-Aggression.[3] This agreement, which has become widely known as the Molotov–Ribbentrop Pact, made it possible for Germany to attack Poland on 1 September 1939 without entanglement with the Soviets. On 17 September 1939, the Red Army invaded Poland from the east and five days later the advancing German and Soviet troops met under amicable circumstances, celebrating that fact by a joint 'victory parade' in Brest. By a secret protocol attached to the Pact, the Union of Soviet Socialist Republics (USSR) and the German Reich divvied up Eastern Europe between them. The deal—as amended by a secret provision attached to a treaty concluded after the occupation of Poland[4]—left Finland, Estonia, Latvia, Lithuania, eastern Poland and what is now Moldova to the Soviet 'sphere of influence'.

In furtherance of this arrangement, the USSR cajoled the Baltic states into concluding Mutual Assistance Pacts in September and October 1939, which permitted the establishment of Soviet military bases in their territories.[5] Finland, in contrast, rejected a similar treaty, and on 1 December 1939 the USSR attacked Finland, launching the 105-day-long Winter War, in which Finland managed to defend its independence but lost a sizable part of its territory.[6]

In mid-June 1940, the USSR presented the Baltic governments with a demand for the total occupation of their territories, backed by a warning that military resistance would be repressed. The Baltic governments capitulated and Soviet forces invaded. Shortly thereafter, hasty 'elections' were held, in which only candidates approved by the Communist Party could run. The resulting 'parliaments' immediately petitioned Moscow to admit the Baltic states into the Soviet Union, a wish that was promptly granted, and the Baltic states were annexed to the USSR in early August 1940. Thus, '[w]ithin three months, the three states had been transformed from independent sovereign republics into union republics, constituent parts of a latter-day empire'.[7]

What happened next had something to do with a particular Soviet interpretation of history. The USSR took the view that the legitimate post-1917 governments in the Baltic states had not been the ones with which they had negotiated peace treaties in 1920, but rather Bolsheviks who had been toppled by 'bourgeois democratic' regimes. Accordingly, everyone involved in governing the Baltic states between 1918 and 1940 was seen as having played a role in an illegal usurpation of Soviet power.

[3] Treaty of Non-Aggression, Germany–USSR, signed at Moscow, 23 August 1939, reproduced at <http://www.lituanus.org/1989/89_1_03.htm> (accessed 3 March 2013).

[4] Treaty of Friendship, Cooperation and Demarcation, Germany–USSR, signed at Moscow, 28 September 1939, reproduced at <http://en.wikisource.org/wiki/German-Soviet_Boundary_and_Friendship_Treaty_28_September_1939> (accessed 3 March 2013).

[5] Pact of Mutual Assistance, Estonia–USSR, signed at Moscow, 28 September 1939, in force 4 October 1939, 198 LNTS 223; Pact of Mutual Assistance, Latvia–USSR, signed at Moscow, 5 October 1939, in force 11 October 1939, 198 LNTS 381; Pact of Mutual Assistance, Lithuania–USSR, signed at Moscow, 10 October 1939, 3 *Soviet Documents on Foreign Policy*, 380.

[6] See Plakans, above n 1, 339, and Kasekamp, above n 1, 126.

[7] Plakans, above n 1, 344.

Furthermore, having regained control over the Baltic territories in 1940, the Soviet authorities wished to reorganize the societies and economies along communist lines. The combination of these factors resulted in a highly systematic repression of the political, administrative, military and economic elites of the countries: undesirable persons were convicted by military tribunals for anti-Soviet or anti-communist offences and either executed or sent to prison camps in the USSR.[8] Lesser 'offenders', including family members of those convicted, were deported to remote parts of the Soviet Union. On 13–14 June 1941, during one night alone, more than 40,000 people were 'taken by truck to gathering points at peripheral railroad stations, packed into boxcars, and then taken to different points in the interior of the USSR'.[9]

In 1941, Germany attacked the USSR and occupied the Baltic states. The Nazis began carrying out their own repression campaign; murdering local Jews, Roma and those with Communist sympathies. Also, a significant number of Jews from other countries were brought into the Baltics for execution. Altogether some 300,000 people were murdered on Baltic soil during the German Occupation.[10]

In 1944, the Red Army invaded again and re-established Soviet rule. The authorities were now confronted with a group of individuals—known as the 'forest brethren'—hiding from the Soviet authorities in the woods, and to some extent engaging in guerrilla warfare tactics. A two-fold strategy was adopted to deal with them. On the one hand, there began a campaign of extrajudicial executions of the forest brethren, who were regarded as 'bandits'. On the other hand, to reduce support for them, another wave of deportations was undertaken. Deportation also served the purpose of accelerating the collectivization of agriculture through 'dekulakization'—the physical removal of well-off farmers.

As a result, from 1940 through 1953, some 200,000 people were expelled from the Baltic states.[11] Most notably, from 25–28 March 1949, in what was known as Operation *Priboi* ('Breaker'), the Soviet authorities deported some 90,000 Estonians, Latvians and Lithuanians to various parts of the USSR, in particular the Amur, Irkutsk, Novosibirsk, Omsk and Tomsk *oblasts* and the Krasnoyarsk *krai*.[12] On top of the deportation effort, some 75,000 people from the Baltic region were sent to forced labour camps (the infamous Gulag). All in all, roughly ten percent of the adult population of the Baltic states was either killed, imprisoned or deported by the Soviets.

[8] Consider, for example, the fate of the members of the Tallinn Rotary Club, who in the 1930s included numerous movers and shakers of Estonian society. According to a study recently commissioned by the Club, of the ninety-one men who had been members in 1930–40, a third managed to escape to the West. Of the rest, sixty per cent were either executed or imprisoned, and the vast majority of those imprisoned died in jail or in prison camps. See 'Liikmed 1930–1940', *Tallinn Rotary Club* [website], <http://www.rotary.ee/tallinn/et/klubi-ajalugu/liikmed-.html> (accessed 3 March 2013, in Estonian).

[9] Plakans, above n 1, 347. [10] Plakans, above n 1, 353. [11] Plakans, above n 1, 367–8.

[12] Heinrihs Strods and Matthew Kott, 'The File on Operation "Priboi": A Re-Assessment of the Mass Deportations of 1949', *Journal of Baltic Studies*, *33* (2002), 1–36, 241.

(II) Nazi Crimes in the Baltic States

The offences committed during the German occupation of the territory of the Baltic states, like those perpetrated in other Soviet-claimed territories, were immediately subjected to scrutiny.

As early as 1942, several years before the end of the war, the Soviet Union established an Extraordinary State Commission to investigate the offences of Nazis and their collaborators. This body was tasked with amassing evidence of crimes committed and damage caused by German forces occupying Soviet territory[13] and reports of the commission were used, inter alia, at the Nuremberg trial.[14] During the next few years, local commissions of a similar nature, numbering more than one hundred,[15] were set up in Soviet-controlled territories, including the Baltic states.

In 1943, the Presidium of the Supreme Soviet of the USSR passed a decree 'on the penalties for German-fascist evildoers, guilty of murdering and torturing the Soviet civilian population and Red Army prisoners-of-war, and for Soviet citizens [guilty of] spying and treason of the Motherland, and for their accomplices'.[16] In accordance with this enactment, numerous trials were held all across the Soviet Union. The prosecutions relied on the evidence gathered by the Extraordinary State Commission and its local branches, and, most crucially, confessions of the accused. Two of the most widely known of these trials were held in 1943: the Krasnodar trial, which dealt with a group of eleven Russian and Ukrainian auxiliaries to *Sonderkommando 10a*, and the Kharkov trial, which focused on three Germans and one Russian accused of killing civilians.[17]

These proceedings set the tone for subsequent trials, held in 1945–6 in Kiev, Minsk, Leningrad, Smolensk, Briansk, Nikolaev, Velikie Luki and elsewhere.[18] With respect to the Baltic territories, a trial took place in Riga in early 1946 and resulted in the conviction and execution of seven German ex-officials of the Riga military district.[19] These trials, characterized by the application of the 1943 edict, appear

[13] See generally Marina Sorokina, 'People and Procedures: Toward a History of the Investigation of Nazi Crimes in the USSR', *Kritika: Explorations in Russian and Eurasian History*, *6* (2005), 797–831.

[14] For the role of the Commission in preparing the Soviet case at Nuremberg, see George Ginsburgs, *Moscow's Road to Nuremberg: The Soviet Background to the Trial* (Boston, MA and Leiden: Martinus Nijhoff, 1996), especially 37–40.

[15] Sorokina, above n 13, 801.

[16] An English translation of the edict appears in F.J.M. Feldbrugge, 'War Crimes in Soviet Criminal Law: A Postscript', *Review of Central and Eastern European Law*, *25* (1999), 459–61.

[17] For an illuminating account of the Krasnodar trial and the background to Soviet prosecutions, see Ilya Bourtman, '"Blood for Blood, Death for Death": The Soviet Military Tribunal in Krasnodar, 1943', *Holocaust and Genocide Studies*, *22* (2008), 246–65. See also the judgment in *USSR v Langheld et al. (Case of Atrocities Committed by German-Fascist Invaders in the City of Kharkov and Kharkov Region During Their Temporary Occupation)* (Military Tribunal of the 4th Ukrainian Front, USSR, 1943), the English text of which appears in *Nazi Crimes in Ukraine 1941–1944: Documents and Materials* (Kiev: Institute of State and Law of the Academy of Sciences of the Ukrainian SSR, 1987), 279–83.

[18] Ginsburgs, above n 14, 40.

[19] See 'Riga Trial', *Jewish Virtual Library* [website], <http://www.jewishvirtuallibrary.org/jsource/Holocaust/WarCrime50.html> (accessed 3 March 2013).

to have come to a conclusion with respect to Soviet citizens in 1947 and as regards enemy nationals in 1949.[20] During the period in question, military tribunals across the USSR convicted roughly 2.5 million people of offences relating to the German occupation.[21]

The Soviet proceedings did not take place only during the war and the immediate post-war period. There appears to have been something of a break in the 1950s, but another wave of prosecutions commenced in the 1960s and, again, also involved the territory of the Baltic states. Two particularly prominent trials, somewhat hampered by the absence of some of the accused, were held in Estonia. In 1961, a prosecution was mounted against Ain-Ervin Mere (commander of the Estonian Security Police under the Self-Administration set up under German occupation), Ralf Gerrets (deputy commandant of a concentration camp at Jägala), and Jaan Viik (a guard at the camp, for the mass-murder of Jews). The three men were convicted and sentenced to death. Gerrets and Viik were duly executed. However, Mere had taken up residence in the UK and the British government declined to extradite him, citing a lack of evidence. He died in 1969 in Leicester, England. A fourth person, Aleksander Laak, commandant of the Jägala camp, had initially also been indicted, but he committed suicide in Winnipeg, Canada—allegedly after some prompting from a Zionist 'avenger'—before the start of the trial.[22]

In 1962, another trial was held where Juhan Jüriste, Karl Linnas and Ervin Viks were charged with murdering 12,000 civilians at a concentration camp at Tartu. All three defendants were convicted and sentenced to death, but only Jüriste was actually executed. For the want of an extradition treaty, Viks was not extradited from Australia and he died there in 1983. The US, however, deported Linnas to the USSR. (In view of the American non-recognition policy of the annexation of the Baltic states and the death sentence passed *in absentia*, the deportation was quite extraordinary.[23]) Linnas died in 1987 in a Soviet prison hospital while awaiting retrial.

The Soviet investigations and trials of Nazis and their collaborators, which continued into the 1980s,[24] should be approached with care. First of all, the historical record that they generated is tainted by conscious falsification of evidence. It is quite telling that the person in charge of editing the reports of the Extraordinary State Commission was none other than Andrey Vyshinsky,[25] who, for example, personally 'corrected' forensic medical reports provided to the Commission.[26] The most notorious instance of direct falsification was the fabrication of evidence to suggest that

[20] F.J.M. Feldbrugge, 'War Crimes in Soviet Criminal Law: A Propos—The Lukianoff Case', *Review of Socialist Law*, *10* (1984), 293.

[21] Ginsburgs, above n 14, 41.

[22] Jonathan Freedland, 'Revenge', *The Guardian*, 26 July 2008, <http://www.guardian.co.uk/world/2008/jul/26/second.world.war> (accessed 3 March 2013).

[23] See Jerome S. Legge, Jr, 'The Karl Linnas Deportation Case, the Office of Special Investigations, and American Ethnic Politics', *Holocaust and Genocide Studies*, *24* (2010), 26–55.

[24] For a late case, see Feldbrugge, above n 20.

[25] While Vyshinsky later gained some prominence as one of the prosecutors at Nuremberg, his main claim to fame was the orchestration of show trials during Joseph Stalin's Great Purge in the late 1930s.

[26] Sorokina, above n 13, 827–9.

the Germans were responsible for the massacre of some 22,000 Polish officers at Katyn,[27] whereas in reality they had been killed by the Soviet NKVD—the People's Commissariat for Internal Affairs.

Second, the judicial proceedings were egregious examples of show trials. They were characterized by inflated charges, an extensive reliance on (coerced) confessions (often involving grotesquely self-deprecating admissions of guilt), impotent defence counsel, and carefully orchestrated media coverage.

Third, with respect to Soviet citizens, the main legal basis for the trials was Section 58 of the 1926 Criminal Code of Soviet Russia, dealing with 'counterrevolutionary crimes',[28] a concept with notoriously broad scope.[29] Later trials, conducted under the 1961 Criminal Code of Soviet Russia or the relevant counterparts in the other Soviet republics, relied on the provision that criminalized the 'betrayal of the fatherland'.[30] Thus, as Ferdinand Feldbrugge, an eminent Dutch scholar of Soviet law explained:

> [T]he edict of 1943 supplied the legal definition, the *Tatbestand*, for the crimes of *foreign war criminals*, but only the basis for special penalties (hanging and *katorga* [i.e. forced labour under harsh conditions]) with regard to *Soviet citizens* convicted of similar war crimes. Indeed the looseness of the Soviet definition of treason made it unnecessary to draft special provisions for punishing Soviet citizens who had acted against the Soviet Union in wartime. When we speak, therefore, of war crimes committed by Soviet citizens, we have in mind what is technically the crime of treason.[31]

As a result, it may be difficult to tell who during this period were actually convicted of war crimes and who were convicted of some perceived disloyalty to the Soviet regime.

Finally, only during the later trials was there any specific concern for the persecution and extermination of ethnic and racial groups. The earlier trials were fixated on the anti-Soviet dimension of the defendants' conduct rather than any specific violations of the law of armed conflict or more general principles of humanity. Thus, Jewish victims were initially not designated as 'Jews' or 'people' or 'civilians', but as 'Soviet citizens of Jewish descent' or some such, in an attempt to cast the Soviet state as the greatest victim.

Having said all this, one cannot deny the atrocities committed by Nazi Germany in the territory that it occupied during World War II. There is also no doubt that locals—be they Estonians, Latvians or Lithuanians, or Russians, Byelorussians or Ukrainians—for a variety of reasons, and sometimes quite enthusiastically, collaborated with the

[27] Sorokina, above n 13, 804–806.

[28] For an English translation of the provision, see 'Criminal Code of RSFSR', <http://www.cyberussr.com/rus/uk58-e.html> (accessed 3 March 2013). Section 59 of the Code, addressing 'crimes against the administrative order that are especially dangerous to the USSR', also proved useful.

[29] As Aleksandr Solzhenitsyn rhetorically asked in *The Gulag Archipelago*, '[w]ho among us has not experienced its all-encompassing embrace? In all truth, there is no step, thought, action, or lack of action under the heavens which could not be punished by the heavy hand of Article 58': Aleksandr Solzhenitsyn, *The Gulag Archipelago* (New York, NY: Harper & Row, 1st edn, 1973), 60.

[30] Section 64a.

[31] Feldbrugge, above n 20, 293.

Germans and actively partook in the atrocities.[32] It is probable that many of these individuals were caught in the vast net cast by the Soviet authorities. Thus, grossly imperfect as the Soviet investigations and trials may have been, they generated at least a semblance of accountability for offences committed in Eastern Europe in the interests of the Axis powers.

(III) Soviet Crimes in the Baltic States

The conduct of the Soviet regime itself was, of course, never critically evaluated. Thus, when the Baltic states regained independence in 1991, the situation was such that while Nazi crimes in their territories had at least to some extent been investigated and judicially processed, no legal assessment had been given to the conduct of members of the Red Army or other authorities of the Soviet Union in the Baltic territories. The three Baltic states were determined to rectify the situation.

(1) Preparatory steps

In 1992 all three states established national institutions to compile evidence of offences committed by the occupying regimes—both German and Soviet, though admittedly focusing on the latter. Thus, in Estonia a State Commission for the Investigation of Policies of Repression operated until 2004, while the Latvian Centre for the Documentation of the Consequences of Totalitarianism[33] and the Genocide and Resistance Research Centre of Lithuania[34] continue their work to this day. Furthermore, in 1998, the presidents of the Baltic states set up expert bodies with international or mixed membership to specifically consider the occupation period in their respective countries in a historical perspective. Thus emerged the Estonian International Commission for Investigation of Crimes against Humanity (replaced in 2008 by the Institute of Historical Memory),[35] the Latvian History Commission,[36] and the International Commission for the Evaluation of the Crimes of the Nazi and Soviet Occupation Regimes in Lithuania.[37]

Furthermore, all three states embarked on a distinctly legal process of evaluating Soviet-occupation-era atrocities.[38] The first obstacle was the lack of adequate

[32] For example, with respect to Estonia, see generally *Estonia 1940–1945: Reports of the Estonian International Commission for the Investigation of Crimes against Humanity* (Tallinn, 2006).

[33] See *Centre for the Documentation of the Consequences of Totalitarianism (CDCT)* [website], <http://www.sab.gov.lv/index.php?lang=en&page=15&sub=260> (accessed 3 March 2013).

[34] See *Genocide and Resistance Research Centre of Lithuania* [website], <http://www.genocid.lt> (accessed 3 March 2013).

[35] See *Estonian Institute of Historical Memory* [website], <http://www.mnemosyne.ee> (3 March 2013).

[36] See 'Latvia's History Commission', *Ministry of Foreign Affairs of Latvia* [website], <http://www.mfa.gov.lv/en/policy/4641/4661/4664/> (accessed 3 March 2013).

[37] See *The International Commission for the Evaluation of the Crimes of the Nazi and Soviet Occupation Regimes in Lithuania* [website], <http://www.komisija.lt> (accessed 3 March 2013).

[38] All three became parties to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, GA Res. 2391 (XXIII) (26 November 1968), in force 11

legislation. Obviously the Soviet approach of classifying war crimes as a form of treason was out of the question. In any event, even though all three states initially continued to apply the existing Soviet-era criminal legislation, they purged these instruments of all distinctly Soviet offences. Accordingly, all three states first had to modify their legislation—a process that in hindsight looks rather peculiar.

In 1992, Lithuania passed a special Act providing for the responsibility for the genocide of the Lithuanian people.[39] Section 1 of the Act defined genocide, broadly following the definition of the Genocide Convention.[40] Section 2 added that 'killing and torturing the people of Lithuania, deportation of its population carried out during the years of Nazi and Soviet occupation and annexation of Lithuania, corresponds to the definition of the crime of genocide as it is described by international law'. In an effort to codify Lithuanian criminal law, the crime of genocide was incorporated into the Criminal Code in 1998. The definition of the offence referred to 'actions committed with intent to physically destroy, in whole or in part, residents belonging to a national, ethnical, racial, religious, social or political group' and then listing the various modalities.[41]

In 1993, Latvia amended its Criminal Code with a new chapter, dealing with international crimes. Notably, section 68/1 provided that 'crimes against humanity, including genocide', are certain deliberate acts committed with intent to destroy, in whole or in part, a particular national, ethnical, racial or religious group.[42] Section 68/3 proscribed war crimes, defined as 'violations of the laws and customs of war'.

In 1994, Estonia inserted a provision dealing with genocide and crimes against humanity into the Criminal Code as section 61/3, which referred to:

> [c]rimes against humanity, including genocide, as these offences are defined in international law, that is, the intentional commission of acts directed to the full or partial extermination of a national, ethnic, racial or religious group, a group resisting an occupation regime, or other social group, the murder of, or the causing of extremely serious or serious bodily or mental

November 1970, 754 UNTS 73—Estonia acceded on 21 October 1991, Latvia on 14 April 1992 and Lithuania on 1 February 1996.

[39] Įstatymas dėl atsakomybės už Lietuvos gyventojų genocidą [*Law on the Responsibility for the Genocide of the Population of Lithuania*], 9 April 1992, No. I-2477, Valstybės žinios (1992), No. 13-342. See also Justinas Zilinskas, 'Broadening the Concept of Genocide in Lithuania's Criminal Law and the Principle of *nullum crimen sine lege*', *Jurisprudencija*, *4* (*118)* (2009), 335; Rytis Satkauskas, 'Soviet Genocide Trials in the Baltic States: The Relevance of International Law', *Yearbook of International Humanitarian Law*, *7* (2004), 392.

[40] But for two points of difference, see Zilinskas, above n 39, 336.

[41] Baudžiamasis kodeksas [*Criminal Code*], 1961/1990, Section 71(1), cited in *Compliance of the Republic of Lithuania Law 'On Compensation for the Damage Inflicted by the USSR Occupation' (Wording of 12 March 1998), the Republic of Lithuania Law 'On Restoring the Rights of Persons Repressed for Resistance Against the Occupation Regimes' (Wording of 12 March 1998) and the Republic of Lithuania Law 'On Liability for Genocide of Residents of Lithuania' (Wording of 9 April 1992 with Subsequent Amendments) with the Constitution of the Republic of Lithuania*, Case No. 09/2008 (Constitutional Court, Lithuania, 2010). A separate section created an aggravated form of the offence, involving the killing of the victims or organizing the commission of genocide by other persons. Criminal Code 1961/1990 (Lithuania), section 71.

[42] Cited in 'Third Periodic Report of States Parties Due in 1997—Latvia', Committee on the Elimination of Racial Discrimination, Doc. CERD/C/309/Add.1 (25 March 1999), [21].

harm to, a member of such group or the torture of him or her, the forcible taking of children, an armed attack, the deportation or expulsion of the native population in the case of occupation or annexation and the deprivation or restriction of economic, political or social human rights.[43]

At the same time, three provisions regarding war crimes were introduced into the Criminal Code, dealing respectively with the abuse of the civilian population in a zone of hostilities, mistreatment of prisoners of war, and the use of prohibited means and methods of warfare.[44]

Before looking at the proceedings undertaken within this legal framework, a few general observations are in order. First, all three states have since adopted completely new codifications of substantive criminal law—Latvia in 1998,[45] Lithuania in 2000,[46] and Estonia in 2001.[47] I have mentioned the early legislation above because the lion's share of criminal cases concerning Soviet offences were dealt with under the earlier legislation.

Second, a striking feature of the Estonian and Lithuanian legislation is the broadening of the definition of genocide. According to the 1948 Genocide Convention, the crime of genocide encompasses certain violent or coercive acts 'committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'.[48] Lithuanian law adds 'social or political group[s]' to the list, whereas Estonian law mentions 'a group resisting an occupation regime, or other social group' (the former being a thinly veiled reference to the forest brethren). The extension of the definition of genocide to social and political groups is not a uniquely Baltic phenomenon—numerous other states have done so[49]—but it doubtless has special significance in the case of the Baltics (and also, for example, for Ethiopia in view of the Red Terror of the 1970s).

Third, early Estonian and Latvian definitions of crimes against humanity hardly qualified as masterpieces of legal craftsmanship. For whatever reason, the legislators tried to address crimes against humanity and genocide jointly. They did not succeed very well and in fact caused considerable confusion. The recent codifications have resolved the problem by treating the two offences separately.

[43] Criminal Code (Estonia), section 61/1(1), as introduced by Eestis inimsusevastaseid kuritegusid või sõjakuritegusid toimepannud isikute kriminaalvastutuse seadus [*Act on the Criminal Liability of Persons Who Have Committed Crimes against Humanity or War Crimes in Estonia*], 9 November 1994, Riigi Teataja I 1994, 83, 1447.

[44] Criminal Code (Estonia), above n 43, sections 61/2, 61/3, and 61/4.

[45] Krimināllikums [*Criminal Code*], 17 June 1998, Latvijas Vēstnesis No 199/200 (8 July 1998). See, in particular, section 71 (genocide), section 71/2 (crimes against humanity) and section 74 (war crimes).

[46] Baudžiamasis kodeksas [*Criminal Code*], 26 September 2000, Valstybės žinios 2000 No. 89-2741. See, in particular, section 99 (genocide), section 100 (crimes against humanity), sections 101–113 (war crimes).

[47] Karistusseadustik [*Penal Code*], 6 June 2001, Riigi Teataja I 2001, 61, 364. See, in particular, section 89 (crimes against humanity), section 90 (genocide) and sections 94–109 (war crimes).

[48] Convention on the Prevention and Punishment of the Crime of Genocide, GA Res. 260 A (III) (9 December 1948), in force 12 January 1951, 78 UNTS 277, Article II.

[49] See John B. Quigley, *The Genocide Convention: An International Law Analysis* (Farnham: Ashgate, 2006), 17–18.

But from these premises, imperfect as they may have been, the Baltic states proceeded to investigate, indict and try a number of persons suspected of having perpetrated international crimes against Estonians, Latvians and Lithuanians. The defendants were mainly regional heads and operational commissioners of the Ministry of Internal Affairs (MVD), the NKVD and the Ministry of State Security (MGB).

There is, unfortunately, no definitive list or count of all the trials, let alone of all the investigations that did not lead to trials. But by my last count, Estonian courts have convicted eleven persons,[50] Latvian courts nine, and Lithuanian courts another dozen or so. Yet the total number of investigations is in the order of several hundred as many cases were closed due to a shortage of evidence, or the death or ill-health of the accused, who were by this time in their 70s and 80s. Thus, I will mention here only a few representative cases, focusing especially on those which garnered international attention due to proceedings before the European Court of Human Rights.

(2) Prosecution for crimes against humanity and genocide

The bulk of the cases addressed two aspects of Soviet repression: the deportation of civilians and the extrajudicial execution of forest brethren. Yet the way these acts have been qualified as a matter of law has differed from state to state.

In Estonia, virtually all of the cases have proceeded under section 61/1 of the old Criminal Code, which, as already mentioned, contained the awkward amalgamation of genocide and crimes against humanity. An important case came before the Estonian courts in 1998, when Karl-Leonhard Paulov, a former 'combat agent' (*agent-boyevik*) of MGB was prosecuted for having killed three forest brethren in 1945 and 1946 by shooting them in the back.

The case is notable because this appears to have been the first occasion where such an agent was actually prosecuted. Furthermore, the case allowed the Supreme Court to clear up the confusion created by the legislature in defining international offences in Estonian law. The Court, by relying on the definitions contained in Article 6(2) of the Nuremberg Charter and Article 2 of the Genocide Convention, outlined the elements of genocide, distinguishing it from crimes against humanity.[51] Finally, the case allowed the Supreme Court to clarify the status of the forest brethren. The Supreme Court agreed with the position of the appellate court that they were civilians for the purposes of the law of armed conflict.[52] Therefore depriving them

[50] See 'Aegumatud rahvusvahelised kuriteod—Kriminaalasjad', *Estonian Security Police* [website], <http://www.kapo.ee/est/toovaldkonnad/aegumatud-rahvusvahelised-kuriteod/kriminaalasjad> (accessed 3 March 2013, in Estonian).

[51] *In re Paulov*, Case No. 3-1-1-31-00, Riigi Teataja III 2000, 11, 118 (Supreme Court, Estonia, 2000).

[52] The Courts, somewhat problematically, based themselves here on Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, signed at Geneva, 8 June 1977, in force 12 July 1978, 1125 UNTS 3, Article 50(1): 'A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.'

of the right to life and the right to a fair trial could be qualified as other 'other inhumane act[s]' falling within the definition of crimes against humanity in Article 6(2)(c) of the Nuremberg Charter. In a later case, concerning a MGB agent named Vladimir Penart, who in 1953 had shot another of the forest brethren, the Supreme Court had the occasion to further explain the point.[53] The Court noted that whether or not the forest brethren qualified as combatants had to be evaluated in light of the 1907 Hague Regulations which codified customary international law at the time. The Court noted that since the forest brethren did not meet the criteria of Articles 1 and 2 of the Regulations defining combatants, they were to regarded as civilians.

In only one instance has there been prosecution for genocide in Estonia. In 2007, one Arnold Meri was indicted under the provision in the new Penal Code dealing exclusively with genocide for his alleged involvement in the deportation of 251 civilians from the island of Saaremaa during Operation *Priboi*. However, the trial was suspended because of the aged defendant's ill health, and subsequently closed when he died. Thus, Estonian courts have not had the occasion to pronounce on whether the deportation campaign amounted to genocide.

In Latvia, the intermingling of the definitions of crimes against humanity and genocide also caused some difficulty. However, there the authorities and courts opted for genocide. For example, in affirming the conviction of Alfons Noviks, the former People's Commissar of the Interior of the Latvian SSR, for his involvement in the deportation, the Latvian Supreme Court explicitly qualified this conduct as '[g]enocide against those inhabitants of Latvia whom Alfons Noviks marked as socially dangerous and detrimental to the Soviet regime'.[54]

In Lithuania, there was little alternative in respect of the early cases to qualifying similar conduct as genocide, as the definition of crimes against humanity was introduced into Lithuanian law by the entry into force of the new Criminal Code in 2003.[55]

In this context, the charge of crimes against humanity is clearly the less problematic one. The deportation campaign certainly satisfies either of the two contextual elements of crimes against humanity. There can be little doubt that, given the large number of persons affected by the measures, especially in relation to the size of the total population of the Baltic countries, the acts were widespread. In light of the deportation being carried out meticulously against specific segments of the population according to lists previously drawn up, they were also systematic. As regards modalities of crimes against humanity, that is to say the specific acts that amount to the offence if the contextual element is satisfied, both murder and deportation are recognized as such by international law.[56]

[53] *In re Penart*, Case no. 3-1-1-140-30, Riigi Teataja III 2004, 2, 23 (Supreme Court, Estonia, 2003).

[54] *In re Noviks*, Case No. #PAK-269 (Supreme Court, Latvia, 1996), *Baltic Yearbook of International Law, 1* (2001), 261, 298.

[55] Zilinskas, above n 39, 338.

[56] Charter of the International Military Tribunal, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, UK–US–France–USSR, signed at London, 8 August 1945, in force upon signature, 82 UNTS 279, Article 6(1)(c); Rome Statute of

The genocide charges, in contrast, are far more problematic. The main question is whether the activities of the Soviet authorities were undertaken with a view to eliminating a specific group, and if so, whether the group was covered by the definition of genocide. Here one stumbles on the innovation of the law of the Baltic states with respect to the range of protected groups. Whatever may be the status of customary law today, it is difficult to make the argument that, in the 1940s and 1950s, the destruction of social or political groups amounted to genocide under customary law. Hence, the genocide of a 'group resisting occupation' or of 'those inhabitants…marked as socially dangerous and detrimental to the Soviet regime' is a notion fraught with difficulty.

However, there is a different way of approaching the matter. As the International Criminal Tribunal for the former Yugoslavia has recognized, genocidal intent need not be manifested in 'desiring the extermination of a very large number of the members of the group', but 'may also consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such'.[57] An Estonian legal scholar, Lauri Mälksoo, has argued that the context of the Soviet repressions in the Baltic states indicates a genocidal intent in this sense.[58] The repressions were directed against the political, economic and intellectual elites, with the further hidden agenda of subjugating national groups. However, as Mälksoo notes, it may be difficult to prove such intent on the level of the officials who actually carried out the deportation orders.[59]

As regards modalities, while the execution of individuals would certainly qualify as an act of genocide if the necessary *dolus specialis* is present,[60] the status of deportation is far less certain.[61]

In view of all this, Justinas Žilinskas, a Lithuanian legal scholar who has extensively studied the approach to the crime of genocide in Lithuania,[62] sensibly concludes that '[i]n many instances, it may be advisable to qualify crimes of the Soviet regime as crimes against humanity to avoid possible problems with the principle of *nullum crimen sine lege*'.[63]

the International Criminal Court, Rome, 17 July 1998, in force 1 July 2000, 2187 UNTS 90, Article 7(1)(a) and (d).

[57] *Prosecutor v Jelisić*, Case no. IT-95-10, ICTY Trial Chamber, Judgment (14 December 1999), [82].

[58] Lauri Mälksoo, 'Soviet Genocide? Communist Mass Deportations in the Baltic States and International Law', *Leiden Journal of International Law*, *14* (2001), 784–5.

[59] Mälksoo, above n 58, 785.

[60] Rome Statute, above n 56, Article 6(a).

[61] UN Secretary-General, 'Draft Convention on the Crime of Genocide', UN Doc. E/447 (26 June 1947), 24: 'Mass displacement of populations from one region to another also does not constitute genocide. It would, however, become genocide if the operation were attended by such circumstances as to lead to the death of the whole or part of the displaced population (if, for example, people were driven from their homes and forced to travel long distances in a country where they were exposed to starvation, thirst, heat, cold and epidemics)'.

[62] Justinas Žilinskas, *Nusikaltimai žmoniškumui ir genocidas tarptautinėje teisėje bei Lietuvos Respublikos teisėje* (Vilnius: Lietuvos teisės universitetas, 2003).

[63] Zilinskas, above n 39, 344.

(3) Prosecution for war crimes

Although there exists a fairly large body of cases where the offence was characterized as a crime against humanity or as genocide, there have not been many war crimes trials.

This may seem curious in light of the fact that it has been an article of judicial faith in the Baltic states that their territories were militarily occupied by the USSR until 1991. Hence, the law of armed conflict (in particular, the law of occupation) should have applied and its serious violations ought to be prosecutable as war crimes. Moreover, the law of armed conflict (and hence war crimes law) was far better developed at the relevant time compared to the international law relating to crimes against humanity and genocide, which should have made laying war crimes charges technically much simpler. However, crimes against humanity and genocide appear as powerful and self-explanatory labels for the Soviet crimes, whereas war crimes might be viewed by the public as mere technicalities. In other words, describing the Soviet conduct as crimes against humanity (or, better yet, genocide) better reflects the subjective suffering felt by the victims.

That said, it is interesting that the most controversial of all the cases involving Soviet crimes in the Baltic states has been one of the very few war crimes trials—the prosecution of Vasily Kononov in Latvia.[64] The facts of the case relate to the period after the Baltic states had been annexed by the Soviet Union and had then been occupied by Germany. Units of Soviet guerrillas, known as the Red Partisans, operated in the occupied territories, spreading political propaganda among the local population and engaging in acts of sabotage. To get a sense of the *modi operandi* of the Partisans, one can refer to the Soviet Supreme Command order of 17 November 1941, which instructed that '[a]ll settlements in the rear of the German troops, 20–60 km deep behind the front line and 20–30 km to the right and to the left of the roads, must be destroyed and burned to ashes'.[65]

In 1944, Kononov was a sergeant in command of a platoon of Red Partisans in Latvia. His unit suspected that a number of the inhabitants of a village called Mazie Bati had revealed to the Germans the location of another group of partisans, who had been subsequently ambushed and killed by German soldiers. At the same time, the villagers, apparently fearing an attack by the partisans, turned for assistance to the German military administration, which supplied several households with a rifle and two grenades.

[64] For more detailed examinations, see Rain Liivoja and Ieva Miluna, 'Latvia' in 'Correspondent's Reports: A Guide to State Practice in the Field of International Humanitarian Law', *Yearbook of International Humanitarian Law, 13* (2010), 571–4; Lauri Mälksoo, *'Kononov v Latvia', American Journal of International Law, 105* (2011), 101–8; Giulia Pinzauti, 'The European Court of Human Rights' Incidental Application of International Criminal Law and Humanitarian Law: A Critical Discussion of *Kononov v Latvia*', *Journal of International Criminal Justice, 6* (2008), 1043–60; Mariya S. Volzhskaya, '*Kononov v Latvia*: A Partisan and a Criminal—The European Court of Human Rights Takes a Controversial Stance on War Crimes', *Tulane Journal of International & Comparative Law, 19* (2011), 651–68.

[65] Cited in Pavel Polian, *Against Their Will: The History and Geography of Forced Migration in the USSR* (New York, NY: Central European University Press, 2005), 124.

On 27 May 1944, Sergeant Kononov led his unit, wearing German army uniforms to avoid detection, into the village where the inhabitants were preparing to celebrate Pentecost. They split into groups and searched several farmhouses, finding the weapons supplied by the Germans. They ordered the heads of families—altogether six men, who offered no resistance—into the yard from their houses. They bolted the doors after them and shot the men. The partisans then set fire to two farmhouses, thereby burning to death the people inside—one man and three women, one in the final stages of pregnancy.

In 1998, the Latvian authorities opened an investigation into Kononov's wartime conduct. He was subsequently prosecuted for war crimes under the 1993 amendment to the Latvian Criminal Code. The proceedings were long and complex, making two cycles through the courts. In the end, the Latvian courts found that Mr Kononov had violated several rules of the law of armed conflict, namely ill-treatment, wounding and killing of persons *hors de combat*,[66] treacherous wounding and killing (by making improper use of enemy uniforms),[67] breach of the special protection accorded to women,[68] and destruction of property not imperatively demanded by the necessities of war.[69] He was sentenced to eighteen months' imprisonment, time already served in pre-trial detention.

(IV) Proceedings before the European Court of Human Rights

Several defendants in these cases have complained to the European Court of Human Rights of various violations of the European Convention on Human Rights. Some applicants have questioned the procedural fairness of the trials or the surrounding circumstances. The Court has not been particularly receptive to allegations that due process guarantees have been violated and has on a number of occasions declared complaints along those lines manifestly ill-founded.[70] Somewhat more problematic has been the fact that the defendants have been rather old and not in the best health. Thus, at least in one instance the Court found that the conditions of detention were incompatible with the age and ill-health of the particular defendant and therefore amounted to a violation of the prohibition of degrading treatment.[71]

The brunt of the legal challenge has related, however, to the possibility that the defendants have been tried under retroactive law: as already noted, the proceedings

[66] Regulation respecting the Laws and Customs of War on Land, annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land, The Hague (Hague Regulations), 18 October 1907, in force 26 January 1910, 205 CTS 277, Article 23(c).

[67] Hague Regulations, above n 66, Article 23(b).

[68] General Orders No. 100—Instructions for the Government of Armies of the United States in the Field, 24 April 1863 (US), Articles 19 and 37; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, signed at Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 287, Article 16.

[69] Hague Regulations, above n 66, Article 25.

[70] See *Kononov v Latvia*, Application no. 36376/04, ECtHR, Decision (20 September 2007); *Tess v Latvia (No. 2)*, Application No. 19363/05, ECtHR, Decision (4 January 2008).

[71] *Farbtuhs v Latvia*, Application no. 4672/02, ECtHR, Judgment (2 December 2004).

have been conducted with respect to events taking place in the 1940s and 1950s but under legislation enacted in the 1990s.

The relevant provision of the Convention is Article 7, which reads as follows:

> (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> (2) This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

In early 2006, the Court made two decisions regarding Estonia. The applicants had complained of a violation of Article 7 because they had been convicted of crimes against humanity committed before the Estonian Criminal Code was amended to incorporate such offences. In dismissing the arguments, the Court held that deportation and extrajudicial execution committed post-Nuremberg had doubtless been criminal according to international law, which satisfied the requirement of Article 7(1).[72] While individual points in the court's reasoning are open to criticism, the conclusion appears valid.[73]

Regarding Mr Kononov's allegation as to the retroactivity of Latvian law, the main question was 'whether on 27 May 1944 the applicant's acts constituted offences that were defined with sufficient accessibility and foreseeability by domestic law or international law'.[74] In 2008, a Chamber of the Court, by a narrow majority of four votes to three, found that they were not.[75] In 2010, the Grand Chamber reversed that decision, by fourteen votes to three, finding that they were.[76]

At first sight, the disagreement between the Latvian courts and the Chamber seems to relate to the status of the villagers and any possible protection deriving from international law due to that status. The Latvian courts had regarded the villagers as civilians with the attendant protection against attack. The Chamber disagreed.[77] It considered the villagers 'collaborators of the German Army' who could not be deemed civilians.[78] This suggests that collaboration turned them into combatants—a

[72] *Kolk and Kislyiy v Estonia*, Application nos 23052/04 and 24018/04, ECtHR, Decision (17 January 2006); *Penart v Estonia*, Application no. 14685/04, ECtHR, Decision (24 January 2006).

[73] Antonio Cassese, 'Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law: *The Kolk and Kislyiy v Estonia* Case before the ECHR', *Journal of International Criminal Justice*, *4* (2006), 410–18.

[74] *Kononov v Latvia*, Application no. 36376/04, ECtHR, Judgment (24 July 2008), [116]. There was also the question whether, by intervening domestic statutory law, the crimes had become statute barred—Russia thought so. *Kononov v Latvia (Chamber)*, [105]. But I will leave that issue aside for the moment.

[75] *Kononov v Latvia (Chamber)*, above n 74. Majority: President Zupančič (Slovenia), Judges Bîrsan (Romania), Gyulumyan (Armenia) and Myjer (The Netherlands).

[76] *Kononov v Latvia*, Application no. 36376/04, ECtHR GC, Judgment (17 May 2010).

[77] *Kononov v Latvia (Chamber)*, above n 74, [107]. See, however, Diss. Op. of Judge David Thór Björgvinsson, [1]: 'This Court is in no position to refute the finding or to override the conclusions of the national courts as regards the facts of the case and the applicable law'.

[78] *Kononov v Latvia (Chamber)*, above n 74, [129] and [131].

position that is rather odd. Moreover, the argument put forward by the applicant that Latvia had lawfully become part of the USSR[79] is difficult to reconcile with the idea that the villagers were targetable as enemy combatants, that is 'persons belonging to a hostile army'. If the annexation was lawful, and the villagers were Soviet nationals on Soviet territory, surely they could not have been regarded as part of a hostile army.[80] The Grand Chamber later simply hedged its bets, observing that even if the villagers were considered combatants or civilians having taken part in hostilities, they were still entitled to protection upon capture, and their extrajudicial execution contravened the law of armed conflict. And as civilians they would have been entitled to even greater protection.[81]

On one level, the whole case can be seen as a dispute about the identification and interpretation of specific rules of the law of armed conflict, and their application to the case at hand. The Chamber may have simply misapplied the law and the Grand Chamber rectified this. It is not as if there has not been a struggle with the concepts of combatants and civilians elsewhere; plus, the Court's expertise is not really in the law of armed conflict.

But there appears to be a more fundamental disagreement buried beneath the legal niceties of 'retroactivity'. One of the revealing points of controversy was whether the villagers, by arming themselves with weapons provided by the Germans, ostensibly for defensive purposes, lost their status as civilians. Russia, intervening in the proceedings in support of the applicant, certainly thought so. Russia suggested that any argument as to self-defence against the anti-Nazi partisans was 'unacceptable, since it went against the tenor of the Nuremberg judgment. No legitimacy whatsoever could attach to the collaboration with the Nazi criminal regime.'[82] The Chamber agreed. It dismissed the idea that the villagers engaged in collaboration in order to defend themselves against potential attacks of the Red Partisans: 'National Socialism is in itself completely contrary to the most fundamental values underlying the [European] Convention [on Human Rights] so that, whatever the reason relied on, it cannot grant any legitimacy whatsoever to pro-Nazi attitudes or active collaboration with the forces of Nazi Germany'.[83] In effect, the Chamber took the position that the alleged 'pro-Nazi' views of the villagers deprived them of protection accorded to civilians under international humanitarian law.[84] Indeed, the Chamber was somehow very insistent in suggesting that the villagers 'had it coming'. As the Chamber said itself, 'the villagers must have known that by siding with one of the belligerent parties they would be exposing themselves to a risk of reprisals by the other'.[85]

[79] *Kononov v Latvia (Chamber)*, above n 74, [94].

[80] *Kononov v Latvia (Chamber)*, above n 74, [97]. This question was explicitly brought up by Lithuania. *Kononov v Latvia (GC)*, above n 76, [179]. See also [217] ('persons belonging to the hostile army').

[81] *Kononov v Latvia (GC)*, above n 76, [194], [202]–[203], [227].

[82] *Kononov v Latvia (Chamber)*, above n 74, [106].

[83] *Kononov v Latvia (Chamber)*, above n 74, [130].

[84] *Kononov v Latvia (Chamber)*, above n 74, [130]; and Diss. Op. of Judges Fura-Sandström, Davíd Thór Björgvinsson and Ziemele, [12].

[85] *Kononov v Latvia (Chamber)*, above n 74, [130]. Cf. Pinzauti, above n 64, 1058. Moreover, reprisals are used to compel an enemy to follow the law. Germany admittedly violated all sorts of rules, but what was this putative reprisal directed against?

In short, Russia suggested, and the Chamber accepted, that the protection deriving from the law of armed conflict depends on where one's sympathies lie. To take the argument to its logical conclusion—the law of armed conflict only protects the 'good guys'. This, however, goes against the very core principles of this body of law, which is supposed to apply quite independently of the justness of one's cause.

The 'good guys' versus 'bad guys' theme appears in a rather striking fashion once more in Russia's arguments:

> [T]he Latvian courts should not have applied by analogy the Charter of the Nuremberg Tribunal—whose purpose was to punish crimes committed by the Axis powers in the occupied territories—to the applicant, who had fought alongside the anti-Hitler coalition in his own country, the USSR. Such an extension was unacceptable and manifestly contrary to the judgment of the Nuremberg Tribunal on which the entire post-war legal and political system was based.[86]

At least some of the judges were persuaded by this reasoning. In his Concurring Opinion attached to the Chamber judgment, Judge Myjer recorded his understanding that 'the Nuremberg trials and the subsequent trials of the Nazis and their henchmen at the international and national level were to be the final 'judicial settlement' under criminal law of what had happened during the Second World War'.[87] He then referred to the applications made to the European Court previously by individuals who had many years after the war been tried for war crimes perpetrated in the interest of Axis powers. But they were 'Nazi collaborators and had no right to complain about the fact that they were tried for war crimes or crimes against humanity many years after the end of the Second World War'.[88] The *Kononov* case was different, as this was 'the first case before this Court relating to events which took place during the Second World War in which the person on trial was not associated with the Nazis or their allies and collaborators, but was on the side of the Allied powers fighting the Nazis'.[89] Apparently a distinction was to be made here.

This point was picked up by three dissenting judges of the Chamber who observed:

> This case is allegedly different since the applicant belonged to the Allied powers fighting against the Nazis. The legal basis for such an approach is unclear. Why should criminal responsibility depend on which side those guilty of war crimes were fighting on?[90]

(V) By Way of Conclusion

Why indeed? Yet the line of reasoning adopted by Russia, and accepted by some of the European judges, is not novel. During the drafting of the Nuremberg Charter,

[86] *Kononov v Latvia (Chamber)*, above n 74, [104]; see also *Kononov v Latvia (GC)*, above n 76, [174]–[175].

[87] *Kononov v Latvia (Chamber)*, above n 74, Conc. Op. of Judge Myjer, [5].

[88] *Kononov v Latvia (Chamber)*, above n 74, [6].

[89] *Kononov v Latvia (Chamber)*, above n 74, [5].

[90] *Kononov v Latvia (Chamber)*, above n 74, Diss. Op. of Judges Fura-Sandström, Davíd Thór Björgvinsson and Ziemele, [3].

the Soviet Union took a similar stance. Justice Robert Jackson, the US representative during the Charter negotiations and chief prosecutor at the trial, has written that:

> [t]he Soviet Delegation proposed and until the last meeting pressed a definition which, in our view, had the effect of declaring certain acts crimes only when committed by the Nazis. The United States contended that the criminal character of such acts could not depend on who committed them and that international crimes could only be defined in broad terms applicable to statesmen of any nation guilty of the proscribed conduct. At the final meeting the Soviet qualifications were dropped and agreement was reached on a generic definition acceptable to all.[91]

The qualifications of course made their way into the Charter as jurisdictional limitations—the tribunal was only competent to deal with Axis war crimes. But the point is that already in the preparatory stages of the Nuremberg process, the Soviet Union was of the view that certain crimes are *by their very definition* only capable of being committed by someone else—the enemy, in this instance, the 'Fascist-German invaders'.[92]

The survival of this view points to a deeper problem, namely the persistence in the Soviet, and now Russian, ideology of what has been called the 'myth of the war'. Marina Sorokina from the Russian Academy of Sciences has astutely observed that:

> [a]mong the many and varied Stalinist political myths that have been gradually destroyed in Russia in recent decades, the 'myth of the war' has proved to one of the most resilient.... According to its simple and bewitching logic, everything 'ours' consisted of heroes and victims, and everything 'alien' was associated with enemies and criminals.[93]

Sorokina further argues that the Extraordinary State Commission, tasked with investigating the damage done by Nazi Germany to the Soviet Union, was '[o]ne of the immediate participants in the creation of the Stalinist war myth'.[94] The same can no doubt be said about the war crimes trials conducted in the Soviet Union. Perhaps one of the most successful individual components of this myth-creation was the shifting of the blame for the Katyn massacre to the Germans. When in 2010 the lower house of the Russian parliament finally condemned Katyn as a

[91] *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945*, Publication 3080, International Organisation and Conference Series II, European and British Commonwealth 1 (Washington, DC: US Department of State, 1949), vii–viii.

[92] Interestingly, French case law prior to 1994 interpreted crimes against humanity to mean 'inhumane acts and persecution committed in a systematic manner *in the name of a State practising a policy of ideological supremacy*, not only against persons by reason of their membership of a racial or religious community, but also against the opponents of that policy, whatever the form of their opposition' (emphasis added): *Barbie* (1985) 78 ILR 136 (Court of Cassation), 137; (1998) 100 ILR 330 (Court of Cassation), 336; *Touvier* (1992) 100 ILR 337 (Court of Appeal of Paris), 350–351. This neatly excluded possible French (Vichy Government) crimes during World War II, the Algerian War, and French operations in Indochina. See Luc Reydams, 'National Laws', in Dinah L. Shelton (ed), *Encyclopaedia of Genocide and Crimes Against Humanity*, Vol. 2 (Detroit, MI: Gale, 2005), 730. See also Leila Nadya Sadat, 'The Legal Legacy of Maurice Papon', in Richard J. Golsan, *The Papon Affair: Memory and Justice on Trial* (New York, NY: Routledge, 2000), 131–160.

[93] Sorokina, above n 13, 800–1.

[94] Sorokina, above n 13, 801.

crime of Joseph Stalin, the Communist Party voted against the motion, because it did not believe that the USSR had anything to do with the atrocity.[95]

In view of the 'myth of the war', it is easier to understand why Russia got so worked up about the *Kononov* case, while its reaction to the previous cases was more muted. The previous defendants had mostly been people doing the dirty work of the NKVD or the MGB. Little love has been lost between the ordinary Russian and various forms of Stalinist secret police. But Kononov was a partisan—a heroic fighter against Nazism—with the Order of Lenin, the highest Soviet decoration, pinned to his chest. While in many Western countries it is the prisoner-of-war who enjoys the status of the ultimate war hero, in the Soviet Union it was the Red Partisan. Thus, the prosecution attacked not just Kononov the man, but the Soviet partisan as a mythical figure.

The biggest complaint against the trials in the Baltic states has been that they are rewriting history. 'It is true', notes Yulia Latynina, a prominent Russian journalist, 'that the verdicts of the Latvian court and the [Grand Chamber of the] European Court of Human Rights are vivid examples of an attempt to rewrite history. But this is precisely the history that needs to be rewritten'.[96] Several contributors to this volume have elsewhere discussed the expressive value and the history-writing function of criminal law.[97] As Mark Drumbl explains, '[e]xpressivism…transcends retribution and deterrence in claiming as a central goal the crafting of historical narratives, their authentication as truths, and their pedagogical dissemination to the public'.[98] This indeed appears to be the main function of the trials undertaken by the Baltic states. In the majority of cases, the defendants, when found guilty, have not been given any actual punishment.[99] In Estonia, for example, the seemingly standard practice is to mete out a sentence of eight years, suspended for three years.

But, interestingly, the public, who the Baltic states wish to educate, is not actually the society in which the trials take place. Every Estonian, Latvian or Lithuanian can tell a story about a relative or a family friend who was somehow affected by the Soviet oppression. They do not need proof—though they probably appreciate the judicial authentication of their stories. The public who is being educated is the world community. And as long as there are judges in Strasbourg who believe the Soviet war myth, the history lesson may well be necessary.

[95] 'Russian Parliament Condemns Stalin for Katyn Massacre', *BBC News*, 26 November 2010, <http://www.bbc.co.uk/news/world-europe-11845315> (accessed 3 March 2013).

[96] Yulia Latynina, 'The Red Partisans', *The St. Petersburg Times*, 11 June 2010, <http://www.sptimes.ru/index.php?action_id=2&story_id=31668> (accessed 3 March 2013).

[97] See, in particular, Mark A. Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge University Press, 2007), 173–80; Gerry Simpson, *Law, War and Crime* (Cambridge: Polity, 2007), Chapter 4.

[98] Drumbl, above n 97, 173.

[99] Even though a punishment may also serve an expressive purpose. See Drumbl, above n 97, 174.

13

Universal Jurisdiction: Conflict and Controversy in Norway

Julia Selman-Ayetey[*]

(I) Introduction

The media frenzy surrounding the trials of Slobodan Milosevic and Charles Taylor demonstrate the significant public attention given to the prosecution of core international crimes.[1] Well-publicized trials such as these tend, however, to be prosecuted at the International Criminal Court (ICC), at ad hoc tribunals, or at hybrid courts. Unfortunately, many trials of core international crimes processed through domestic judicial systems have remained relatively obscure. The pending closure of the ad hoc tribunals and the attention given to war crimes trials that recently occurred in Bangladesh and Uganda may reflect a slow but growing trend toward states conducting domestic trials of core international crimes and the media's willingness to cover such events. This chapter is part of larger efforts to study domestic trials and understand their potential to develop international law. To this end, the chapter will briefly outline the law of universal jurisdiction and examine its application in Norway in the case of *Public Prosecutor v Mirsad Repak*.[2] Constitutional issues raised by the case will be critically explored and the question of whether any other legal forum would have been better suited to try the case will also be addressed. Finally, the chapter will conclude that the number of domestic prosecutions for

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[1] For brevity here the term 'core international crimes' is used to encompass war crimes, crimes against humanity and genocide unless otherwise specified. The term is adopted from Jo Stigen, 'The Right or Non-Right of States to Prosecute Core International Crimes under the Title of "Universal Jurisdiction"' *Baltic Yearbook of International Law*, *10* (2010). It should be noted that Stigen also includes the offence of torture. Some academics would understandably also include crimes against peace, slavery and piracy in the definition of core international crimes.

[2] *The Public Prosecuting Authority vs Mirsad Repak*, 08-018985MED-OTIR/08, 2 December 2008 (Oslo District Court, Norway).

core international crimes, whether based on universal jurisdiction or not, must increase for impunity to decrease.

(II) Universal Jurisdiction in Brief

Whilst international adjudication is now broadly accepted, the principle of universal jurisdiction remains one of the most controversial aspects of international criminal law. The law of universal jurisdiction, a type of extraterritorial jurisdiction, permits and sometimes requires countries to prosecute individuals for specific crimes regardless of where the crime occurred or the nationality of the suspect(s) or victim(s). Its foundation rests on the premise that some crimes (generally those that amount to breaches of international humanitarian law) are so grave, of such magnitude, and so shocking to the conscience that they are an offence against the world, permitting any state to prosecute the alleged perpetrator:

> In other words, universal jurisdiction, in its purest form is one in which mankind acts on behalf of itself everywhere to ensure that the perpetrators of particularly heinous crimes will not escape justice on the basis of the limitations of national judicial systems or those of international courts.[3]

In relation to universal jurisdiction, Anne-Marie Slaughter highlights that 'government officials, scholars, and media officials have already expressed concern over how to tame this new beast'.[4] Whilst concern has indeed been expressed, the law of universal jurisdiction is not quite so new. On the contrary, it has existed in some form or another, in both domestic and international law, since at least World War II.[5] More than 100 countries have laws that provide for the exercise of universal jurisdiction over core international crimes,[6] but as Kingsley Moghalu states, 'having a law on the books is often quite different from the political will to apply it in terms of a practical assertion of universal jurisdiction'.[7]

Devised as a means of circumventing impunity, fears of allegations of lawfare[8] and political manipulation are just two of the reasons states avoid employing universal jurisdiction. It is thus unsurprising that the ICC does not possess universal

[3] Kingsley Chiedu Moghalu, *Global Justice: The Politics of War Crimes Trials* (Westport, CT: Praeger, 2006), 77.

[4] Anne-Marie Slaughter, 'Defining the Limits: Universal Jurisdiction and National Courts', in Stephen Macedo (ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (Philadelphia, PA: University of Pennsylvania Press, 2004), 168.

[5] See Joseph Rikhof, 'Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity', *Criminal Law Forum*, *20/1* (2009), 1–51; Supreme Court of Israel, *Attorney-General of the Government of Israel v Eichmann* (1962) *36 ILR* 277; J.E.S. Fawcett, 'The *Eichmann* Case', *British Yearbook of International Law*, *38* (1962), 181–215.

[6] Amnesty International, *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation* (International Secretariat, 2001).

[7] Moghalu, above n 3, 82. See also Stigen, n 1.

[8] See Joshua Rozenberg (2010), 'Proposals to restrict the right to prosecute "universal jurisdiction" offences' *Law Society Gazette* [online], <http://www.lawgazette.co.uk/opinion/joshua-rozenberg/proposals-restrict-right-prosecute-universal-jurisdiction-offences> (accessed 6 March 2013).

jurisdiction, but instead operates on the principle of complementarity. Whilst the arguments for and against the law of universal jurisdiction are well documented and largely beyond the scope of this chapter, it is nevertheless argued that the assertion of jurisdiction based on universality should be viewed as legitimate when used as a last resort[9] or where the most appropriate forum consents to prosecution by the 'intervening' state.

(III) Norway's Disdain for War Crimes

Following the lead of other pro-universal jurisdiction countries such as Belgium, Germany and Spain, Norway has demonstrated its commitment to cooperating with other states in matters of international criminal law.[10] In 2005 Norway created a special prosecutorial post and established a unit within the National Criminal Investigation Service (NCIS) to investigate and potentially extradite or prosecute individuals suspected of involvement in core international crimes.[11] However, Norway's desire to prosecute war criminals was frustrated when its attempt to have the trial of Michel Bagaragaza transferred to its jurisdiction was refused by the International Criminal Tribunal for Rwanda (ICTR) on the grounds that Norway lacked the appropriate legislation.[12] Although the prosecution of Bagaragaza could have occurred in Norway under ordinary domestic offences such as murder and assault, the ICTR asserted that those charges would not adequately reflect the repugnant nature of the offences with which Bagaragaza was charged. It thus became apparent that Norway could encounter opposition in any future attempts to try war criminals under existing legislation. Consequently, in 2007, the Norwegian government announced its plan to enact legislation to prohibit core international crimes that were not specifically provided for in prior domestic law. Since then, the country has increasingly taken a stand against alleged war criminals. In 2006, Norway carried out its first extradition of a war criminal when it transferred a Croatian national, Damir Sireta, to Serbia.[13] In April 2009, seven Israeli military

[9] The last resort is generally held to be the situation where the most appropriate forum state is unwilling or unable to act.

[10] For example, Norway has financially contributed to the Extraordinary Chambers in the Courts of Cambodia (ECCC). See ECCC (21 April 2011), 'Norway Contributes NOK 6,000,000 to ECCC', *ECCC* [press release], <http://www.eccc.gov.kh/sites/default/files/media/5-ECCC%20PR%2021%20Apr%202011%20(Eng).pdf> (accessed 6 March 2012). Additionally Norway's International Development Minister, Erik Solheim has suggested that the UN should investigate alleged war crimes in Sri Lanka, see Kristoffer Ronneberg (27 August 2009), 'Solheim krever etterforskning etter Sri Lanka-video', *The Aftenposten* (Norway) [online], <http://www.aftenposten.no/nyheter/uriks/article3237855.ece> (accessed 6 March 2013).

[11] Human Rights Watch, *Universal Jurisdiction in Europe: The State of the Art*, 18(5D) (2006).

[12] *The Prosecutor v Michel Bagaragaza*, Case No. ICTR-2005-86-S, '*Decision on the Prosecution Motion for Referral to the Kingdom of Norway*' (TC) 19 May 2006, [16]; see also *The Prosecutor v Michel Bagaragaza*, 'Decision on Rule 11 bis Appeal' (AC), 30 August 2006.

[13] Sireta was sentenced to twenty years imprisonment by the District Court of Belgrade, later reduced to fifteen years. He was previously tried in absentia in Croatia and sentenced to twelve years' imprisonment.

officers, as well as Former Israeli Prime Minister Ehud Olmert, Defence Minister Ehud Barak and opposition leader Tzipi Livni, were accused of war crimes in a complaint lodged with Norway's National Authority for Prosecution of Organised and Other Serious Crimes. No action was taken, however, because the individuals were not in Norway. In July 2010, following an international 'wanted notice', the Norwegian authorities extradited Vukmir Cvetovic, a Serbian, to Kosovo where he was subsequently convicted of war crimes and sentenced to seven years' imprisonment.[14] Most recently, in September 2012, Norway's prosecutors embarked upon their first trial for the offence of genocide.[15] As a result of these events, Norway's investigative and judicial authorities have contributed to global justice and have established a reputation for impartiality and independence. Any concerns about abuse or misuse of universal jurisdiction laws on the part of the Norwegian police or judiciary would thus be difficult to substantiate, given the tendency of Norway to engage with other states, extradite when possible, and dismiss complaints of a frivolous or politically motivated nature.

(IV) Universal Jurisdiction and War Crimes Legislation in Norway

Norwegian legislation has enabled prosecution based on universal jurisdiction for over a century. Articles 12(3) and (4) of the Norwegian General Civil Penal Code 1902 (the 1902 Penal Code) permitted the prosecution of nationals, residents and non-nationals for certain crimes committed abroad as long as the conduct was criminal under Norwegian criminal law and the individual was in Norway.[16] Whilst the ability to exercise universal jurisdiction under the 1902 Penal Code was commendable, the problem with the legislation was that perpetrators who committed acts that, for example, would amount to genocide under international law could only be charged with murder in Norway. Prior to the implementation of the Norwegian General Civil Penal Code 2005 (the 2005 Penal Code), the only war-related offences in Norway were those that pertained to acts against the state and the Norwegian Constitution (Constitution).[17] The pre-existing law, the 1902 Penal Code, contained offences that could cover international core crimes in substance, but not in name. To rectify this discrepancy, the offences of genocide, war crimes, and crimes against humanity were adopted into Norwegian law on 7 March 2008 by virtue of an amendment to the 2005 Penal Code.

[14] See EULEX Kosovo (13 July 2010), *European Union Rule of Law Mission* [website], <http://www.eulex-kosovo.eu/en/pressreleases/0074.php> (accessed 6 March 2013).

[15] The trial pertains to acts which occurred during the Rwandan civil war, see 'Rwandan genocide trial opens in Norway' (25 September 2012), *Huffington Post* [website], <http://www.huffingtonpost.com/huff-wires/20120925/eu-norway-rwanda-trial/> (accessed 6 March 2013).

[16] *General Penal Code*, Act of 22 May 1902, No. 10 as subsequently amended by Act of 1 July 1994 No. 50.

[17] *Repak,* above n 2, [65].

The 2005 Penal Code enables the prosecution of core international crimes in Norway. Section 102 provides for the offence of 'crimes against humanity' and section 103 covers 'war crimes', with subsection 103(h) specifically referring to the unlawful confinement of protected persons. These new provisions accord in most part with the definitions under existing international criminal law. The 2005 Penal Code provides Norway with the authority to prosecute Norwegians, residents and foreigners suspected of having committed any of the stated offences regardless of where in the world those offences occurred. In contrast to many other countries, in Norway the decision to prosecute a case based on universal jurisdiction may be taken by the local prosecutor or police commissioner without any senior political input.[18] This policy may assist in minimizing allegations of political influence often associated with the exercise of universal jurisdiction. As with the 1902 Penal Code, in order for this power to be exercised, the suspect must be present in Norway; however, the 2005 Penal Code additionally requires that the prosecution must be in the public interest.[19]

Despite Article 97 of the Constitution, which states that 'no law must be given retroactive effect', legislators drafted section 3 of the 2005 Penal Code in an attempt to permit such retrospectivity in clearly prescribed circumstances.

Section 3 of the 2005 Penal Code states:

> The provisions in Chapter 16 [that is, the war crime provisions] apply to acts committed before their entry into force if the act at the time of its commission was punishable under the criminal legislation in force at the time and considered to be genocide, a crime against humanity or a war crime according to international law. The punishment can however not exceed the punishment that would have been imposed pursuant to the penal provisions [in force] at the time the crime was committed.

This is in contrast to section 3 of the 1902 Penal Code which stated:

> If the criminal legislation has been amended in the period following the commission of an act, the penal provisions in force at the time of its commission shall be applicable to the act unless otherwise provided.

This provision has generally been interpreted as one that prohibits law being applied retrospectively.

(V) The Investigation and Indictment of Mirsad Repak

The war in the former Yugoslavia was largely fought along ethnic lines. Mirsad Repak, an ethnic Bosniak, was a member of the Croatian Defence Forces (HOS), a paramilitary group which, amongst other things, operated the Dretelj detention camp in Bosnia and Herzegovina. In 1992 most of the detainees in the camp were Serbian civilians intended to be exchanged for imprisoned Bosniaks and Croats.

[18] In the United Kingdom, for example, universal jurisdiction over serious international crimes can only be exercised with the express approval of the Attorney-General. Some countries require permission of the State Prosecutor or senior politicians.

[19] International Review of the Red Cross, *National Implementation of International Humanitarian Law: Biannual update on National Legislation and Case Law*, *91* (2009).

The camp became notorious for its brutal guards, and the many atrocities committed there including torture and sexual abuse of both female and male detainees.[20] Repak fled the armed conflict and arrived in Norway in 1993, where he sought asylum. He was granted Norwegian citizenship in 2001.

Repak was initially arrested on charges of unlawful deprivation of liberty, rape and severe injury because core international crimes did not exist in domestic law at the time the alleged offences were committed. However, after the 2005 Penal Code was brought into force and after further investigation, a revised indictment was submitted to the Oslo District Court on 9 July 2008 resulting in Repak being charged with twenty-one offences under the new provisions of the 2005 Penal Code—offences that, importantly, were cross-referenced with the related offences under the 1902 Penal Code: (i) eighteen counts of unlawful deprivation of liberty under the 1902 Penal Code constituting both war crimes and crimes against humanity under the 2005 Penal Code; (ii) two counts of grievous bodily harm (GBH) under the 1902 Code equivalent to war crimes as per the 2005 Penal Code; and (iii) one count of rape under the 1902 Code equivalent to a war crime under the 2005 Penal Code.[21]

The charges arose out of allegations that in 1992, during the war, Repak was complicit in the unlawful deprivation of liberty of eighteen non-combatant civilians and personally raped one woman.[22] By arresting and transferring individuals to the camp, Repak was alleged to have participated in the gross mistreatment of detainees which included severe violence, psychological abuse, inhumane conditions and insufficient provision of food. It was also claimed that he was the leader of an interrogation in which a woman was beaten and tortured.[23] However, this particular act of violence was not covered by the charges in the indictment as they were time-barred from prosecution.[24]

Often those responsible for initiating domestic investigations into international crimes are victims or relatives of victims, ordinary members of the public or campaign groups. Repak's case, however, was initiated following receipt of information from the Danish authorities, who were conducting their own investigations into war crimes involving refugees from the former Yugoslavia.[25] Beginning in 2005, and in conjunction with the State Investigation and Protection Agency in Bosnia and Herzegovina, the Norwegian police had already initiated investigations of individuals who were suspected of war crimes and resident in Norway.[26] With the assistance of the International Criminal Tribunal for the former Yugoslavia (ICTY) and prosecutorial authorities in various former Yugoslav countries,[27] Norwegian authorities intensified their investigation on Repak, arrested him on 8 May 2007 and detained him until February 2008, after which he was released pending trial.[28]

[20] *Repak*, above n 2, [15]. [21] *Repak*, above n 2 [15]. [22] *Repak*, above n 2, [204].
[23] *Repak*, above n 2, [16]. [24] *Repak*, above n 2, [252].
[25] Interview with Petter Mandt, Senior Public Prosecutor, Norwegian National Authority for Prosecution of Organised and Other Serious Crimes (telephone interview, 27 July 2011).
[26] Balkan Insight (25 August 2008), 'Bosnia War Trial First for Norway since 1945', <http://old.balkaninsight.com/en/main/news/12606/?tpl=299&ST1=Text&ST_T1=Article&ST_AS1=1&ST_max=1> (accessed 6 March 2013). The investigation also focused on suspects from Rwanda.
[27] Balkan Insight, above n 26. [28] Mandt, above n 25.

(VI) The Trial and Appeal Judgment

Despite defence counsel's request for dismissal on grounds of unconstitutionality (among others), the trial of Mirsad Repak commenced on 27 August 2008 in the Oslo District Court. It was conducted according to substantive Norwegian laws, the most relevant being both the 1902 and 2005 Penal Codes as well as Norwegian laws of evidence and procedure under the Criminal Procedure Act 1981. Interestingly, as there is no jury in courts of first instance in Norway, the case was solely determined by one judge and two lay members. The Court appointed a Victim's Counsel and the prosecution and defence were composed of two attorneys each. There were more than forty witnesses, approximately half of whom testified in Court in Norway whilst the others testified via telephone or video link from the Norwegian embassies in Australia, Bosnia, Serbia and the United States (US).[29] Additionally, the Court appointed four expert witnesses who gave evidence on the Balkan conflict, the injuries suffered by the alleged victims as well as witness psychology and the process of remembering.[30] Both the first instance trial and appeal were conducted partly in Norwegian and, with the assistance of an interpreter, partly in Serbian/Croatian.[31]

Despite admitting to having made some of the relevant arrests, Repak pleaded not guilty to all charges.[32] He further admitted to having been a coordinator and bodyguard in the HOS but asserted that he 'never participated in the mistreatment of detainees that took place in the Dretelj detention camp'.[33] Interestingly, Repak's defence counsel raised the point that an amnesty was passed in 1999 by the Parliament of Bosnia and Herzegovina that would have prevented Repak from being prosecuted in that jurisdiction. The Court found that by fleeing to Norway, Repak lost the protection of the law in Bosnia and Herzegovina and that the Norwegian authorities were thus entitled to prosecute despite the Bosnian amnesty.[34]

The trial concluded on 22 October 2008, and on 2 December 2008 the Court found Repak 'guilty of eleven counts of war crime in the form of deprivation of liberty of civilian non-combatant Serbs with subsequent internment in the Dretelj camp',[35] contrary to section 103 of the 2005 Penal Code. He was, however, acquitted of rape, both counts of GBH and all the crimes against humanity charges as detailed in section 102 of the 2005 Penal Code. On the evidence, the District Court noted that whilst it accepted that the female victim in question was indeed raped, the evidence was insufficient to establish Repak as the perpetrator and suggested the possibility of mistaken identity.[36] The Court also found that Repak

[29] *Repak*, above n 2, [51]. [30] *Repak*, above n 2, [50]. [31] Mandt, above n 25.

[32] *Repak*, above n 2, [60].

[33] Denis Dzidic and Nidzara Ahmetasevic (26 September 2008), 'Norwegian Courts Try War Crimes', *Balkan Investigative Reporting Network* [website], <http://www.balkaninsight.com/en/article/norwegian-courts-try-war-crimes> (accessed 6 March 2013).

[34] *A v The Public Prosecution; The Public Prosecution v A*, Supreme Court Judgment, 13 April 2011, [39] and [98], at <http://www.domstol.no/upload/HRET/English%20translation%20war%20crimes%20case.doc> (accessed 6 March 2013).

[35] *Repak*, above n 2, [258]. [36] *Repak*, above n 2, [206].

was not a prison guard nor had any major influence there, but did hold a middle leadership position, equivalent to that of a lieutenant, within the HOS with direct responsibilities for the HOS military police.[37] The Court made it clear that although Repak was not criminally liable for the offences which took place in the Dretelj camp, 'it must be presumed that more persons were detained and some arrived earlier at Dretelj than would have been the case without the defendant's complicity'.[38] The arrests that were conducted, or ordered, by him contributed to the detainees' deprivation of liberty and were considered an aggravating factor in sentencing, as were the acts of violent crime and torture which were time-barred from prosecution.[39] The Court sentenced Repak to five years in prison and noted that the deviation from the prosecution's recommendation of ten years' imprisonment was primarily the result of the offences of which Repak was acquitted.[40] Additionally, Repak was ordered to pay a total of Kr 400,000[41] in compensation for non-pecuniary damage to eight victims. He was not ordered to pay costs in the case as the Court stated it was more important that Repak 'should pay the compensation for non-pecuniary damage…than paying costs of the case to the public treasury'.[42]

Repak's lawyers appealed to the Bogarting Court of Appeal on the basis of incorrect application of law and factual inaccuracies. The prosecution also requested the Court of Appeal to reconsider three counts of war crimes of which Repak had been acquitted by the District Court. A re-trial with a jury[43] followed, and in March 2010 the Appeal Court upheld the first instance verdict. Unexpectedly, the Appeal Court accepted most of the prosecution's submissions and found Repak guilty of an additional two counts of war crimes based on unlawful detention, bringing Repak's conviction to a total of thirteen offences.[44] Despite the suggestion by the prosecutor for an eight-year term of imprisonment, in April 2010 the Appeal Court announced that it had reduced[45] his five-year sentence to four-and-a-half years but increased the amount of damages he was to pay to his victims to Kr 1,400,000.[46]

(VII) The Supreme Court Judgments

Subsequently, both Repak's lawyer and the prosecution appealed to Norway's Supreme Court. The defence appealed on a number of grounds, the most relevant of which was the argument that the 2005 Penal Code did not provide a basis for the war crimes charges. The prosecution appeal was against the finding that the

[37] *Repak*, above n 2, [18]. [38] *Repak*, above n 2.
[39] *Repak*, above n 2, [19], [252] and [263]. [40] *Repak*, above n 2, [23]–[24].
[41] Approximately 43,000 British pounds. [42] *Repak*, above n 2, [282].
[43] In Norway a jury will participate in Appeal Court cases where there is a possible sentence of six years' imprisonment or more. The jury consists of ten members split equally between men and women: Petter Mandt, above n 25.
[44] *A v The Public Prosecution; The Public Prosecution v A*, above n 34, [8].
[45] Upon consultation with four members of the jury who are randomly chosen to assist the three appeal judges in deciding on the sentence: Mandt, above n 25.
[46] *Public Prosecutor v Mirsad Repak*, LB-2009-24039 (April 12, 2010). Kr 1,400,000 is approximately 151,500 British pounds.

crimes against humanity offences under the 2005 Penal Code could not apply to Repak's acts. Upon receipt of the applications, the Supreme Court agreed to determine two issues, firstly the constitutional conundrum, which involved consideration of potential limitation of time, abuse of process and retrospectivity, and secondly the severity of punishment.

On 3 December 2010, by a decision of eleven to six[47] rendered by all seventeen of Norway's Supreme Court judges,[48] the Norwegian Supreme Court handed down its judgment.[49] It found that the case against Repak was not 'time-barred'. Given that Repak's alleged acts took place between May and September 1992 and the original indictment was filed on 8 May 2007, the fifteen-year limitation period provided for by the 1902 Penal Code, which for limitation purposes was held to be the applicable law, had not expired. With regard to abuse of process, the Court also found that the defence allegation that the charges against Repak required authorization by King in Council rather than the prosecution authority was unsubstantiated.[50] As for the issue of retrospectivity, a majority of eleven Supreme Court judges held that the District and Appeal Courts were correct in finding that the offence of crimes against humanity could not apply to acts committed prior to the date of its legal effect. Surprisingly, however, they further found that the war crime offence could not apply retrospectively either.[51] In effect, the Supreme Court decided that where offences took place prior to the implementation of the 2005 Penal Code, only the 1902 Penal Code could be used for prosecution.

This ruling, whilst important for the prosecution of future cases, did not absolve Repak of his criminal liability. It will be recalled that the indictment cited both the old and new laws, hence there was no need for a retrial and the thirteen counts against Repak stood, albeit for the offences of deprivation of liberty rather than the more grave offence of war crimes. As a result, the Court directed that the 1902 Penal Code be used to determine his sentence thereby reducing the maximum term of imprisonment to twenty-one years, as opposed to the thirty years available under the 2005 Penal Code.[52] In a judgment rendered on 13 April 2011,[53] the Supreme Court indicated that it viewed Repak's offences as 'extremely grievous'[54]

[47] Mandt, above n 25.

[48] Traditionally only five judges sit in Norwegian Supreme Court cases.

[49] See Supreme Court of Norway (22 December 2010), 'Summary of Recent Supreme Court Decisions 2010 (case no.2010/934)', <http://www.domstol.no/en/Enkelt-domstol/-Norges-Hoyesterett/Summary-of-Recent-Supreme-Court-Decisions/Summary-of-Supreme-Court-Decisions-2010/> (accessed 6 March 2013).

[50] *A v The Public Prosecution; The Public Prosecution v A*, above n 34, [32]–[33].

[51] 'Norway Court Cancels Bosnian's War Crimes Sentence', *The Telegraph* [online], 3 December 2010, <http://www.telegraph.co.uk/news/worldnews/europe/bosnia/8179811/Norway-court-cancels-Bosnians-war-crimes-sentence.html> (accessed 6 March 2013).

[52] This is consistent with Article 7 of the European Convention on Human Rights, which Norway has ratified.

[53] *Prosecutor v Mirsad Repak*, Supreme Court of the Kingdom of Norway, 13 April 2011. See Supreme Court of Norway, 'Summary of Recent Supreme Court Decisions 2011 (Case No. 2010/934)', <http://www.domstol.no/en/Enkelt-domstol/-Norges-Hoyesterett/Summary-of-Recent-Supreme-Court-Decisions/Summary-2011/> (accessed 6 March 2013).

[54] International Review of the Red Cross, *What's New in Law and Case Law Across the World: Biannual Update on National Legislation and Case Law, January–June 2011*, 93 (2011), 868.

acts 'perpetrated against defenceless people and solely motivated by their ethnic background'[55] over a period of more than four months. In accordance with that view, the Court increased Repak's sentence to eight years in prison, two more than suggested by the Prosecution Counsel and the Attorney-General.[56] He was also ordered to pay approximately Kr 30,000 to ten victims and Kr 50,000 to another.[57]

(VIII) Discussion

Repak's case was complicated by the fact that two Penal Codes were cited in the indictment. Section 223 of the 1902 Code, the relevant law in force at the time Repak's acts were committed, detailed the offence of 'unlawful deprivation of personal liberty' which clearly covered the acts of which Repak was accused. However the prosecution sought conviction under the 2005 Penal Code in an attempt to reflect the gravity of Repak's conduct. In accordance with the principle of fair labelling, the defence submitted that the offences under the 2005 Penal Code 'provide a far more defamatory description than that of deprivation of liberty'[58] and thus provided an even stronger reason why the 2005 Penal Code should not be applied retrospectively. With regard to the war crimes charges, the District Court held that the acts detailed in the indictment were completely covered by section 223 of the 1902 Penal Code, which it found had the same aim as section 103(h) of the 2005 Penal Code.[59] The District Court observed that, in order for the section 103 charges to be valid, the 2005 Penal Code required three questions to be answered in the affirmative: (i) was there an armed conflict? (ii) did the victims constitute protected persons? and (iii) were the offences against international law? The first question was quite easily satisfied as the war in the former Yugoslavia was clearly an armed conflict and there was sufficient evidence to link Repak's alleged offences to the war. Secondly, it was accepted that the detainees were effectively hostages, given that the majority of them were intended to be used in a prisoner exchange with the Serbians.[60] The District Court thus concluded that Repak's victims were non-combatants, qualifying them as protected persons.[61] Finally, the District Court used the 1949 Geneva Conventions and the Additional Protocols (the Conventions) to assess whether Repak's acts were contrary to the international law in force at the time they were committed. The District Court found that whether the war in the former Yugoslavia was deemed an international or non-international conflict, Repak's acts were in breach of the Conventions due to both the circumstances and conditions in which the civilians were arrested and detained. In its view, therefore, the war crimes charges were justiciable. Applying the same principle of interpretation, the District Court found that it would be applying

[55] *Prosecutor v Mirsad Repak*, above n 53.

[56] *Prosecutor v Mirsad Repak*, above n 53. See also, 14 April 2011, 'Norwegian Court Sentences Mirsad Repak to Eight Years in Prison', *Balkan Investigative Reporting Network*, <http://www.bim.ba/en/265/10/32188>.

[57] Approximately 3,300 and 5,500 British pounds respectively.

[58] *Repak*, above n 2, [85]. [59] *Repak*, above n 2, [8]. [60] *Repak*, above n 2, [42].

[61] See the Geneva Conventions of 12 August 1949.

the law retrospectively in violation of the Constitution if it were to consider charges of crimes against humanity found in section 102 of the 2005 Penal Code, because it was not drafted in similar terms to any clause in the 1902 Penal Code.[62] The Appeal Court agreed with the District Court's judgment.

The main issue for the Norwegian Supreme Court was to determine whether the 2005 Penal Code was in breach of Article 97 or could lawfully be applied retrospectively. As indicated above, the Supreme Court agreed with the District and Appeal Court's treatment of the crimes against humanity charges in Repak's case but overruled their assessment of the legality of the war crimes charges. The Supreme Court found that the application of the 2005 Penal Code provisions to acts that occurred in 1992 would be a breach of Article 97.[63]

Did the Supreme Court get it right? In the circumstances, yes. Nevertheless, some might say that section 3 of the 2005 Penal Code is not unconstitutional, despite the names of the offences it outlines being different. It could be argued that Repak's conduct (which gave rise to the charges of war crimes) was sufficiently similar in substance to the 'unlawful deprivation of liberty' offence that existed under section 223 of the 1902 Penal Code[64] so that any issue of retrospectivity was merely theoretical. In fact, the six dissenting Supreme Court judges went even further by concluding that convictions based on both 'sections 102 and 103 of the Penal Code 2005 would not be manifestly more onerous than conviction pursuant to section 223 of the Penal Code 1902 which applied at the time'[65] and thus would not be in violation of Article 97. However, bearing in mind the failed Bagaragaza transfer and the principle of fair labelling, on balance it is argued that the Supreme Court made the right decision. They took the widely accepted approach by finding that 'developments in international law and Norway's interest in assisting international criminal courts could not undermine the fundamental requirement that a criminal conviction must have an authority in Norwegian law.[66] With Article 97 prohibiting retrospective application of law there was, at least on a literal interpretation, no basis for the charges in domestic legislation. Thus section 3 of the 2005 Penal Code, on which the prosecution based the 2005 offences in the indictment, was *ultra vires*. It is suggested that had Article 97 not existed, section 3 would be *intra vires* and the reasoning of the District and Appeal Court perfectly sound. Unfortunately, Norway had two sets of laws, neither of which were an appropriate basis for prosecution. The 1902 Penal Code was insufficient because, arguably, it did not adequately reflect Repak's acts, and the 2005 Penal Code was insufficient because it was not in effect at the time. It is suggested that the Norwegian authorities consider amending Article 97 to accord with section 3 of the 2005 Penal Code. This would enable Norwegian courts to validly convict a defendant, whose acts occurred prior to 7 March 2008, of war crimes and crimes against humanity should a case with similar complexities arise in the future.

[62] *Repak*, above n 2, [79].
[63] Summary of Recent Supreme Court Decisions, above n 49.
[64] *Repak*, above n 2, [76].
[65] Summary of Recent Supreme Court Decisions, above n 49.
[66] Summary of Recent Supreme Court Decisions, above n 49.

It is generally held that the relevant laws for determining jurisdiction and charges are those in effect at the time the offences were committed and not at the date of prosecution. To hold otherwise would legitimately raise concerns of unfairness:

> Legal certainty, which underlies the principle of legality, requires that, upon committing their acts, persons know what laws apply and what legal consequences attach to them. If they know that, at the time of commission, under then valid laws, their acts are not amenable to universal jurisdiction, they may decide to commit them (and flee abroad to a State which will possibly not extradite them). Conversely, if they know that their acts are amenable to universal jurisdiction, they may, facing denial of a safe haven abroad, refrain from committing them.[67]

If a suspect is charged with an offence that did not exist at the time of the relevant act, the ability to know the consequences of one's actions is severely impaired, if not made impossible, because jurisdiction is only provided for *post factum*. Whilst the Supreme Court eventually found that the war crime provisions under the 2005 Penal Code could not apply to Repak's acts, it is noted that in 1992 Repak could only have foreseen prosecution in Norway under the 1902 Penal Code. It may thus reasonably be argued that the prosecution should not have been permitted to cite the 2005 Penal Code in the indictment. This would have negated the need for an appeal based on unconstitutionality.

Nevertheless, despite the absence of contemporaneous domestic international criminal offences, and despite the globally entrenched principle of non-retrospectivity, it may not be unreasonable for states that have since adopted offences that may be prosecuted under universal jurisdiction legislation to assert that jurisdiction. First, the principle of legality, the essence of which is clarity and non-retrospectivity of law, is arguably not applicable to rules of procedure, of which jurisdiction is one.[68] Second, many of the international offences prosecuted under universal jurisdiction have existed in treaty and customary international law for decades; hence the lack of domestic universal jurisdiction laws at the time of commission may be said to be irrelevant. The failure of Norwegian prosecutors to have the core international offences against Repak upheld has also been encountered in other European jurisdictions and often attributed to the general lack of domestic legislation covering such conduct prior to 2000.[69] However, it is a fallacy to assert that where such offences are not reflected in domestic legislation, the principle of legality prevents such charges from being laid. It is a norm of customary international law that states are permitted to assert universal jurisdiction over international crimes that were recognized at the relevant time.[70] Crimes against humanity have been recognized in international law for over fifty years and therefore satisfy that test.

[67] Cedric Ryngaert, 'Universal Jurisdiction Over Genocide and War-Time Torture in Dutch Courts: An appraisal of the Afghan and Rwandan Cases', *Hague Justice Journal*, *2* (2007), 21.

[68] This appears to be supported by Ryngaert, see above n 67, 20.

[69] Morten Bergsmo (ed), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Brussels: Torkel Opsahl Academic EPublisher, 2010), 74; Rikhoff, above n 5, 34.

[70] See for example, Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Volume 1: Rules* (Cambridge: Cambridge University Press, 2005); M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (The Hague: Kluwer Law

It is recognized that many states require domestic implementing legislation in order to utilize international law; nevertheless, in states where discretion exists as to the direct application of international law, the prosecution of core international crimes is perhaps one scenario where that discretion should be exercised.

Most legal academics would agree that prosecutions of core international crimes have more of an impact and have the capacity to attain a higher degree of justice if they are carried out in the country where the atrocities occurred. Stigen aptly states that a case arising out of core international crimes:

> [M]ost naturally belongs in the territorial state or in the home state of the victim or the suspect. But sometimes extraditing to an affected state is no real option. The suspect might risk torture or the death penalty there; the legal system might be too weak; the authorities might be implicated in the crimes; or the state might be socially and politically inclined not to prosecute the crimes. If extraditing the suspect to a third state or an international(ised) criminal court is also not an option, prosecution in the custodial state is the only way to avoid impunity.[71]

In Repak's case, Norway was neither home to the crimes nor the country of his birth or that of his victims. Further, Bosnia was not in a period of transition and had already prosecuted a number of war criminals. Thus, despite the statutory authority to do so, some may question Norway's motivation for prosecuting Repak. The answer is found in the fact that, according to the Norwegian Extradition Act, Repak's Norwegian citizenship prevented him from being extradited.[72] The question then arises as to why Repak was not stripped of his Norwegian citizenship. It is not unprecedented for those who have obtained citizenship by fraud/deception or have concealed their involvement in core international crimes and other related offences to have their citizenship revoked. For example, in some cases where naturalized citizens have been suspected of committing core international crimes prior to the acquisition of American nationality, the US authorities have withdrawn citizenship and deported those individuals back to their country of origin or to third countries that wanted them for prosecution.[73] It is believed that at the time of arrest Repak still benefitted from Bosnian citizenship, hence he would not have been rendered stateless if Norway had revoked his citizenship. Whilst not impossible, historically it has been difficult to revoke citizenship in Norway.[74] Given that extradition was not an option and revocation of citizenship not seriously considered, the only

International, 2nd edn, 1999), 240; *Prosecutor v Tihomir Blaskic*, Case IT-95-14-AR, 29 October 1997; *Prosecutor v Tadic*, Interlocutory Appeal on Jurisdiction, IT-94-1AR72, 2 October 1995. Though not a case of universal jurisdiction see also *Kononov v Latvia* (2011) 52 EHRR 21; 29 BHRC 137.

[71] Stigen, above n 1, 96 (citations omitted).

[72] *Norwegian Extradition Act*, No. 39 of 13 June 1975. See also *European Convention on Extradition 1957*.

[73] See for example, T.M. Beiner, 'Due Process for All? Due Process, the Eighth Amendment and Nazi War Criminals', *Journal of Criminal Law and Criminology*, *80* (1989), 293–337; AP (17 March 2012), 'John Demianjuk, convicted Nazi death camp guard, dies aged 91, *The Guardian* [online], <http://www.guardian.co.uk/world/2012/mar/17/john-demjanjuk-nazi-camp-guard-dies> (accessed 6 March 2013).

[74] Mandt, above n 25.

options available to the Norwegian authorities were to prosecute or afford Repak a life without criminal responsibility for his offences.

Still, given the issues that arose in Norway's prosecution of Repak, one would be forgiven for questioning whether a different legal forum would have been more appropriate. The ICC is only authorized to hear cases concerning acts that occurred after 1 July 2002, when the Rome Statute came into effect. The crimes Repak was alleged to have committed took place in 1992, so his case was not eligible to be heard before the ICC. Thus, apart from the unlikely possibility of a country asserting pure universal jurisdiction, any potential prosecution would be left to the ICTY, the Court of Bosnia and Herzegovina (the BiH Court) or Norway, where Repak was residing and had gained citizenship.

Unlike the ICC, the ICTY is permitted to hear cases where the criminal conduct occurred as early as 1 January 1991. Its jurisdiction is to prosecute crimes against humanity, genocide, grave breaches of the Conventions, and violations of the laws or customs of war,[75] and thus would have covered the acts committed by Repak. However, given that the mandate of the ICTY is to 'prosecute persons responsible for serious violations of international humanitarian law',[76] it is conceivable that the acts allegedly committed by Repak would not be considered to be of sufficient seriousness, in comparison to previous defendants, to warrant a prosecution by the ICTY. Interestingly, the fact that the ICTY chose not to exercise its right under Article 9(1) of its Statute[77] implies that it had no interest in prosecuting Repak and had faith in the Norwegian judiciary. That said, technically, Repak could still be charged and tried before the ICTY, as Article 10(2) of the ICTY Statute provides that:

> A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:
> (a) the act for which he or she was tried was characterized as an ordinary crime; or
> (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

As a result of the Supreme Court decision, Repak's conviction was no longer for 'war crimes' but for 'unlawful deprivation of liberty' and thus could be characterized as an ordinary crime as per Article 10(2)(a). However, given the lengths to which the Norwegian Court strived to be transparent[78] and the comparatively minor offences[79] Repak was alleged to have committed, it is very unlikely that the ICTY would seek to do so.

[75] ICTY Statute, Articles 2–5. [76] ICTY Statute, Article 1.

[77] ICTY Statute, Article 9(1): 'The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal'.

[78] Despite the underreporting of the trial in the media, in its judgment the District Court stated: 'Because of the special nature of the case at hand the Court finds reason to emphasise that Norwegian courts operate with complete independence from Norwegian and foreign authorities; nor have such authorities had any influence on the Court's compositions or the present judgment. The Court has not been approached by any foreign authorities—or by Norwegian authorities.' See *Repak*, above n 2, 2[2].

[79] *Repak*, above n 2, [17].

The BiH Court was established in May 2002 to 'ensure the protection of fundamental human rights and freedoms at the state level, as guaranteed by the Constitution of BiH'.[80] Its criminal division has a dedicated War Crimes Chamber that usually consists of a panel of three judges, one of whom is international.[81] The Court is not limited to acts committed within a specific time frame and is not restricted to prosecuting cases in which the defendant is deemed to be amongst those most responsible. Thus Repak's case could have fallen within the remit of the BiH.

It has been said that 'only when the directly affected states fail to investigate and prosecute do they forfeit their legal interest in primary prosecution and thus enable third states to fill the prosecutorial vacuum in order to protect international community values'.[82] There is no indication that the BiH sought extradition or opposed the trial in Norway. In fact, they assisted the Norwegian authorities with the prosecution.[83] For example, BiH police, prosecutors and judicial authorities shared information and found and examined witnesses.[84]

It is clear that BiH consciously yielded to Norway. But what if Bosnia had also wanted to assert its jurisdiction to try Repak? In such an instance, precedent generally affords jurisdiction to the state to which the suspect has a 'genuine link'.[85] The Norwegian authorities would argue there was a genuine link to Norway because at the time of arrest Repak had citizenship, had worked and lived there for fourteen years, and domestic law prevented, or at least made difficult, extradition. Similarly, Bosnia could assert that the fact that Repak was a citizen by birth and had committed the atrocities on its territory provided more of a bona fide link with Bosnia. What at first seems like a relatively straightforward test is thus not so easily applied. Perhaps a better litmus test to decide which state is entitled to jurisdiction is to ask which state has 'closer links'.

Despite the numerous countries that have enacted universal jurisdiction laws:

> [t]oday there is significant support in doctrine for the idea that no State may unilaterally establish order through criminal law, against everyone and the entire world, without there being some point of connection that legitimises the extraterritorial extension of its jurisdiction.[86]

[80] *The Court of Bosnia and Herzegovina* [website], <http://www.sudbih.gov.ba> (accessed 6 March 2013).

[81] *The Court of Bosnia and Herzegovina* website above n 80.

[82] Julia Geneuss, 'Universal Jurisdiction Reloaded? Fostering a Better Understanding of Universal Jurisdiction', *Journal of International Criminal Justice*, *7* (2009), 958.

[83] Mandt, above n 25.

[84] Denis Dzidic and Marina Ferhatovic, 'Refugee War Criminals Pose Dilemma to Scandinavia', *Balkan Insight*, 1 June 2009. The Serbian War Crimes Prosecutor's Office also cooperated with Norwegian authorities, see Public Relations Service (17 April 2011), 'Successful Cooperation of the War Crimes Prosecutor's Office and Norwegian Investigators Results in Conviction of Mirsad Repak for War Crimes in Dretelj Camp', *Republic of Serbia: Office of the War Crimes Prosecutor* [website], <http://www.tuzilastvorz.org.rs/html_trz/VESTI_SAOPSTENJA_2011/VS_2011_04_19_ENG.pdf> (6 March 2013).

[85] See *Nottebohm Case (Liechtenstein v Guatemala)* Second Phase, International Court of Justice (ICJ), 6 April 1955. See also section 153f German Code of Criminal Procedure, which asserts that German authorities will not commence proceedings where it is shown that a state with a stronger link to the crimes is investigating the matter.

[86] Judgment on the Guatemala Genocide Case No. 327/2003, 25 February 2003, available at <http://www.derechos.org.nizkor/guatemala/doc/stsgtm.html>.

States are therefore hesitant to assert authority solely on the grounds of 'pure' universal jurisdiction and usually justify their decision to prosecute on additional grounds of extraterritoriality such as passive personality or the protective principle.[87] One may thus question whether Repak's case is a genuine instance of 'pure' universal jurisdiction, as Norway justified its decision to prosecute on the basis of Repak's residency and acquired citizenship. For these reasons some may be inclined to view the case as one of active nationality rather than universality. However, according to the AU-EU Expert Report on the Principle of Universal Jurisdiction:

> Universal criminal jurisdiction is the assertion by one state of its jurisdiction over crimes allegedly committed in the territory of another state by nationals of another state against nationals of another state where the crime alleged poses no direct threat to the vital interests of the state asserting jurisdiction. In other words, universal jurisdiction amounts to the claim by a state to prosecute crimes in circumstances where none of the traditional links of territoriality, nationality, passive personality or the protective principle exists at the time of the commission of the alleged offence.[88]

As Repak did not possess Norwegian citizenship at the time the atrocities were committed, it is submitted that his case can rightly be categorized as one of universal jurisdiction.[89]

The prosecution of Mirsad Repak was the first war crimes trial in Norway in over fifty years and was also the first case to be tried under the new provisions of the 2005 Penal Code. The trial consequently raises a number of questions: should all domestic trials of core international crimes be obligated to have a jury at first instance? Should they require the entire judging panel to be legally qualified and specialize in international criminal or humanitarian law? Should they have a Victim's Counsel? Additional questions are raised where universal jurisdiction is concerned. Should the implementation of an amnesty in the country where the offence occurred bar prosecution by an intervening state? Should limitation periods prescribed by domestic legislation apply to international core crimes?

The difficulty in applying a new law for the first time, particularly one of this nature, combined with the difficulty in investigating and prosecuting offences committed in another country sixteen years prior, was acknowledged by the prosecutor.[90] It has been suggested that a trial at the ICTY or the BiH Court would have resulted in Repak's defence being 'far more effective'[91] due to those judicial institutions having 'far better

[87] See Gerry Simpson, *Law, War & Crime* (Cambridge: Polity Press, 2007); Menno T. Kamminga, 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences', *Human Rights Quarterly*, *23* (2001), 940–74.

[88] Technical Ad hoc Expert Group on the Principle of Universal Jurisdiction (16 April 2009), 'Report' *Council of the European Union: Council Secretariat*, <http://www.africa-eu-partnership.org/node/847> [8] (emphasis added) (accessed 6 March 2013).

[89] This view is supported by the categorization of Repak's case as one of universal jurisdiction by some NGOs such as International Federation for Human Rights and Redress: see FIDH and Redress (2 June 2009), 'Universal Jurisdiction Developments: January 2006–May 2009', *FIDH* [website], <http://www.fidh.org/IMG//pdf/UJ_Informal_Update_Draft020609.pdf> (accessed 6 March 2013).

[90] See Dzidic and Ahmetasevic, above n 33.

[91] Denis Dzidic (16 February 2010), 'Verdict Against Mirsad Repak Expected Soon', *Balkan Investigative Reporting Network* [website], <http://www.bim.ba/en/206/10/25878/?tpl=30> (accessed 6 March 2013).

knowledge about international humanitarian law and relevant legal standards'.[92] Some might therefore question whether Repak had a fair trial. Two of the three individuals who presided over his first instance trial were lay members, one of whom was a psychologist and the other a web designer.[93] Trials of core international crimes are difficult on any account, even more so when constitutional law and universal jurisdiction are factors to be considered. These trials thus demand a high standard of expertise. It is doubtful whether lay jury members have sufficient knowledge and experience of the law in this area to satisfy the degree of competency required to adjudicate these international offences as demanded by the world community. Whilst Repak was subject to the same procedures any other Norwegian would have at first instance, it is questionable whether such procedures are sufficient for a war crimes trial.

Though it is clear that the Norwegian courts went to great length to ensure Repak's trial was transparent and just, as the old adage goes, justice must not only be done but must be seen to be done. It is likely that had Repak been prosecuted in a more experienced war crimes court, such as the ICTY or the BiH Court, fewer questions would have been raised as to whether justice was indeed seen to be done. It is acknowledged that national courts will, and should, have a degree of autonomy with regard to judicial procedures implemented in domestic prosecutions of core international crimes. Nevertheless, given that these offences may be said to be brought on behalf of the world community, there needs to be further international discussion with the aim of creating a level of consistency across domestic courts that choose to prosecute international offences. Such requirements may reduce appeals, minimize allegations of unfairness and support the legitimacy of domestic prosecutions. Whilst there is always the option of creating new rules, the most practical course of action would be for the international community to come to a consensus concerning which pre-existing international rules of procedure should be adopted for the domestic prosecution of core international crimes (not just those based on universal jurisdiction).[94]

Some academics hold the view that states will continue to view universal jurisdiction with trepidation, preventing it from becoming a common feature of international criminal justice. However, the poor state of the global economy, which will make it difficult to establish more special tribunals in the near future, combined with the relative inefficiency and expense of the international judicial system, reasonably leads one to conclude that if atrocities are to be dealt with at all, it is likely they will need to be prosecuted through domestic systems, many using extraterritorial jurisdiction. Thus it is suggested that the application of universal jurisdiction—though not necessarily 'pure' universal jurisdiction—will indeed become more common.

[92] Dzidic, above n 91. [93] See *Repak*, above n 2.

[94] See also E. Jessberger, 'Universal Jurisdiction' in A. Cassesse et al. (eds) *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009), 557; C. Kress, 'Universal Jurisdiction over International Crimes and the Institut de Droit International', *JICJ*, *4* (2006), 581; Luc Walleyn, 'Universal Jurisdiction: Lessons from the Belgian Experience', *Yearbook of International Humanitarian Law*, *5* (2002), 394–406.

(IX) Conclusion

The decision of a state to prosecute core international crimes when the conduct took place in another country, the victims were not nationals, and the offender was not a national when the crimes were committed, is of great significance, particularly given that universal jurisdiction is capable of being used as a conduit for politics. However, where the power is used genuinely in an attempt to maximize global justice, it should be used with pride and without fear of political controversy. Norway's increasing tendency to investigate, arrest, extradite and now prosecute foreign war criminals not only discourages disreputable individuals from seeking refuge there, but also demonstrates to the rest of the world that Norway is a country that respects international humanitarian law and will utilize its extraterritorial powers when necessary. The paucity of media reports on the prosecution of Mirsad Repak should not be taken as an indication of it being legally irrelevant. The trial was an important one because it achieved the appropriate balance between idealism and pragmatism, law and politics, and justice and impunity. Though legitimate concerns arose, the prosecution and conviction of Mirsad Repak illustrates that such prosecutions can be achieved in an effective and just manner and should provide impetus to other states to take similar action should the need arise. Whilst questions may persist as to whether the BiH Court would have been better placed to try the case, any argument that Norway was wrong to assert its jurisdiction is relatively weak.

The debate surrounding the merits of domestic versus international prosecution of core international crimes is understandable. What cannot be denied is the fact there are far more perpetrators of these heinous crimes than can be tried by international institutions. Hence domestic war crimes trials—whether based on territoriality, nationality, passive personality, the protective principle or universality—will become a vital mechanism for upholding human dignity and ensuring that those deemed to be a *hostis humani generis*[95] do not escape prosecution for the devastation they cause to victims, their families and the world community.

Although it is acknowledged that there have been, and for the foreseeable future will continue to be, important practical, political and legal obstacles that hinder or taint the prosecution of core international crimes in national courts, the increasing calls for the establishment of war crimes tribunals in countries such as Brazil, Liberia and Sri Lanka demonstrate a desire for justice at a local level. Further academic debate is therefore needed regarding the intricacies of such prosecutions, particularly concerning whether domestic courts should be free to prosecute core international crimes entirely according to the substantive and procedural laws of their state, or whether certain standards should be internationally agreed and implemented in an effort to ensure consistency. Additionally, states that currently

[95] Latin for 'enemy of mankind'. See *Filartiga v Pena-Irala*, 630 F. 2d 876 (2d Cir.1980); *Prosecutor v Furundžija*, IT-95-17/1-T, 10 December 1998.

restrict the extradition of their nationals should consider enacting laws to permit the extradition of citizens accused of core international crimes to a country that has closer links with the alleged offences and are willing to prosecute.

Norway is not the first third-party state to try individuals accused of committing war crimes in the Former Yugoslavia. Austria, Denmark, Germany and Switzerland have also prosecuted offenders for these atrocities.[96] The further legitimization of domestic prosecutions of core international crimes will be dependent on the encouragement and support given to states that take such action.[97] Just as the establishment of the ICC and international tribunals brought challenges, so too do domestic trials of core international crimes.[98] But these challenges must be confronted and overcome and countries that attempt to do so must be applauded for blazing the trail of global justice via domestic means.

[96] C.L. Sriram, 'Exercising Universal Jurisdiction: Contemporary Disparate Practice', *The Journal of Human Rights*, *6* (2002), 49–76.

[97] See for example David A. Kaye, Council of Foreign Relations, 'Justice Beyond The Hague: Supporting the Prosecution of International Crimes in National Court', *Special Report No. 61* (June 2011); Mark S. Ellis, 'International Justice and the Rule of Law: Strengthening the ICC through Domestic Prosecutions', *Hague Journal on the Rule of Law*, *1* (2009), 79–86.

[98] For problems in Croatia see Amnesty International (2010), 'Behind a Wall of Silence: Prosecution of War Crimes in Croatia', *Amnesty International* [website] <http://www.amnesty.org/en/library/asset/EUR64/003/2010/en/81544213-9880-4a5e-acea-d5269d0bc8ad/eur640032010en.pdf> (accessed 6 March 2013).

PART 5

AFRICAN HISTORIES

14

Reading the Shadows of History: The Turkish and Ethiopian 'Internationalized' Domestic Crime Trials

*Jackson Nyamuya Maogoto**

(I) Introduction

The domestic trial of individuals is not novel. Numerous countries have laws that allow for prosecution of international crimes through their domestic systems. Domestic trials of individuals for international crimes are on the rise. By the turn of the twenty-first century more than thirty countries were involved in the prosecution of perpetrators of international crimes.[1] Domestic trials now cover various corners of the globe, from Cambodia and Sierra Leone to East Timor and Iraq. These four countries are specifically mentioned as they offer insights into the key differences that distinguish them from other domestic criminal trials.

In Cambodia, Sierra Leone and East Timor, the United Nations was an active player. In the case of Cambodia, The Law on the Establishment of The Extraordinary Chambers of the Courts of Cambodia was the result of an agreement between the United Nations and the government of Cambodia.[2] The Special Court for Sierra Leone was set up jointly by the government of Sierra Leone and the United Nations[3] while the East Timor Special Panels were a result of the promulgation of a constituent instrument of the United Nations Transitional

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[1] See generally Joseph Rikhof, 'Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity' (2009) 20 *Criminal Law Forum* 1.

[2] Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (6 June 2003); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (as amended 27 October 2004), Chapter XIX.

[3] This was established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000. The statute of the Special Court for Sierra Leone *available at* <http://www.sc-sl.org/DOCUMENTS/tabid/176/Default.aspx> accessed 10 January 2013.

Administration.[4] All three feature significant involvement of international personnel within the judicial mechanisms. The Iraqi Special Tribunal (IST), meanwhile, was established by the Coalition Provisional Authority deriving its powers from Security Council Resolution 1483.[5] The IST was a variant of the aforementioned regimes in the sense that it was instituted by the international community and led to the involvement of a core of international advisors. However, as will be seen, in contrast to the Turkish and Ethiopian trials, these courts are hybrid involving a good measure of international involvement in inception and operation. Essentially these are 'nationalized' international trials while the Turkish and Ethiopian courts, though also targeting principal perpetrators and accessories, were 'internationalized' national trials. Though separated by almost eight decades, these early nationalized trials foreshadowed the large-scale domestic prosecution of violations of international law.

This chapter delves into the nuances of the unheralded Turkish and Ethiopian trials. The Turkish and Ethiopian domestic trials were extraordinary in that they used the framework of extant penal codes to prosecute international crimes in accordance with domestic penal codes. Turkish authorities invoked norms encompassing the laws of humanity and crimes against humanity in the prosecution of its political and military elite.[6] Similarly the Ethiopian prosecutions (Red Terror Trials) focused on the former ruling military junta (the Derg),[7] whose senior military and political officials were suspected of committing mass human rights violations—genocide, war crimes and crimes against humanity. Yet, these trials though more 'successful' (in the number of defendants tried and convictions) than, say, the much more famous and relatively well known post-World War I German national

[4] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (16 January 2002); United Nations Transitional Administration in East Timor, Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences (6 June 2000).

[5] UN Security Resolution 1483 issued post Operation Iraqi Freedom which toppled the Saddam Hussein regime among other things had called for the United Nations to play a vital role in reconstruction efforts and the development of institutions in Iraq as well the need for accountability for the crimes committed by the previous Iraqi regime. The Court was set up by a specific Statute issued under the Coalition Provisional Authority. The Statute is *available at* <http://www.cpa-raq.org/human_rights/Statute.htm> accessed 12 January 2013.

[6] On 2 November 1918, a Parliamentarian submitted a motion to institute hearings in the Ottoman Chamber of Deputies to establish the responsibility of the members of the two wartime Cabinets framing the offences under the violations of 'the rules of law and humanity'. Similar sentiments were echoed in early 1919 by Sultan Mehmed VI as head of state who in authorising a new law for court-martialling alleged perpetrators denounced the offences in question as 'crimes against humanity'. See eg Vahakn N Dadrian, 'Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications' (1989) 14 *Yale Journal of International Law* 221, 293–94.

[7] 'Derg' means 'council' or 'committee' in ancient Ethiopian language. This was the name given to the Coordinating Committee of the Armed Forces comprised of 120 commissioned and non-commissioned low-rank officers of the air force, police force and the territorial army which was later to seize power in the disarray spawned in the aftermath of the collapse of the reign of Emperor Haile Selassie I in the face of a people's uprising that culminated in a revolution. The Derg would become synonymous with the communist military Junta that ruled Ethiopia into the early 1990s.

war crimes trials in Leipzig, remain under-researched. Yet, it is in the hidden history of these trials that we see the early signs of hybridity.

(II) Turkey's Involvement in World War I: Militarism and the 'Resolution' of the 'Armenian Question'

(1) Crescents and crosses? The Armenian genocide

During World War I, as the rest of the world looked on, the Ottoman Empire carried out one of the largest genocides in world history massacring large numbers of its minority Armenian population. The exact number killed is contested but falls somewhere between 250,000 and 1,000,000 people.[8] The massive, deliberate and systematic massacres by Turkey of its 'troublesome' Armenian Christian subjects under the cover of war did not go unnoticed.[9] As early as 24 May 1915, the Entente Powers (which together with their junior partners made up the Allied Powers)[10] solemnly condemned 'the connivance and often assistance of Ottoman authorities' in the massacres, adding further that '[i]n view of these new crimes of Turkey against humanity and civilisation . . . the Allied governments announce publicly . . . that they will hold personally responsible . . . all members of the Ottoman government and those of their agents who are implicated in such massacres'.[11]

Evidence suggests that Turkey's entry into World War I was substantially influenced by a desire to create an opportunity to resolve once and for all certain lingering domestic conflicts.[12] The Armenian Genocide was the culmination of many decades of Armenian persecution at the hands of the Turks and heralded

[8] See eg David M Lang, *Armenia: Cradle of Civilization* (Allen & Unwin, 2nd ed, 1978) 289; Vincent H P Caillard, 'Turkey', *The Encyclopædia Britannica,* (*Encyclopædia Britannica,* 11th ed, 1911) Vol 27, 426; Glenn E Curtis (ed.), *Armenia, Azerbaijan, And Georgia: Country Studies* (1995) 14–15, 35; Patrick Balfour, Baron Kinross *Ottoman Centuries: The Rise and Fall of the Turkish Empire* (William Morrow, 1977) 554, 606; Bernard Lewis, *The Emergence of Modern Turkey* (Oxford University Press, 2nd ed, 1968) 356.

[9] Vice-Field Marshal Pomiankowski, the Austrian Military Plenipotentiary attached to the Ottoman General Headquarters during the War, alluded in his memoirs to the unabating antagonism between the Muslim and the non-Muslim nationalities. Referring to 'the spontaneous utterances of many intelligent Turks', Pomiankowski conveyed their view that these conquered people ought to have been forcibly converted into Muslims, or 'ought to have been exterminated (*ausrotten*) long ago': Joseph Pomiankowski, *Der Zusammenbruch Des Ottamanischen Reiches; Erinnerungen an die Turkei aus der Zeit des Weitkrieges* (Zurich: Amalthea-Verlag, 1928), 162.

[10] These were the countries led by the United Kingdom, France and Russia that had waged war against the Central Powers that revolved around the aggression of German and the then Austro-Hungarian Empire, Ottoman Empire and the Kingdom of Bulgaria. The junior partners of the Entente powers were Belgium, Serbia, Italy, Japan, Greece and Romania.

[11] 'France, Great Britain and Russia Joint Declaration of 24 May 1915', *Armenian National Institute* [website], <http://www.armenian-genocide.org/Affirmation.160/current_category.7/affirmation_detail.html> (accessed 1 March 2013).

[12] Mehmed Talat the then Turkish Interior Minister is reported to have expressed this intent to an attache at the German Embassy in Istanbul in charge of the Armenian desk. Talat later Grand Vizier asserted that Turkey was 'intent on taking advantage of the war in order to thoroughly liquidate its

a final move on the part of the Ottoman regime to rid itself, once and for all of its Armenian Christian minority. Alleging treasonable acts, separatism, and other assorted acts by the Armenians as a national minority, the Ottoman authorities ordered, ostensibly for national security reasons, the wholesale 'relocation' of virtually the Empire's entire Armenian population. Despite the promises of Ottoman authorities that promulgated these emergency laws, the Armenians did not return from these deportations.[13]

The deportations proved to be a cover for the ensuing destruction. Ittihadist leaders[14] secretly formed a unit called the Special Organization (*Teşkilat-i-Mahsusa*), one of whose principal purposes was to resolve the 'Armenian Question'. The Organization Unit's mission included deployment in remote areas of Turkey's interior in order to ambush and destroy convoys of Armenian deportees. The elimination agenda extended to the sinking of transport ships at sea.[15]

(2) The Paris Peace Conference—victory in war and defeat in securing justice

When Turkey signed the Armistice on 30 October 1918, she lay at the mercy of the European Allies. British Prime Minister Winston Churchill described Turkey as being 'under the spell of defeat, and of deserved defeat'.[16] Echoing this, his Foreign Minister, George Curzon, in denouncing Turkey, noted it was 'a culprit awaiting sentence'.[17] Turkey's culpability, in Allied eyes, involved mainly war crimes and crimes against its own citizens. The Allies, pursuant to their 1915 Declaration,[18]

internal foes, i.e, the indigenous Christians, without being thereby disturbed by foreign intervention.' German Ambassador Wangenheim's 17 June 1915 report to his Chancellor in Berlin. *German Foreign Ministry Archives,* A A Turkei 183/37, A19744.

[13] In a Memorandum dated 26 May 1915, the Interior Minister requested from the Grand Vizier the enactment through the Cabinet of a special law authorising deportations. For the English text of the law, see R Hovannisian, *Armenia on the Road to Independence 1918* (University of California Press, 1967) 51.

[14] The virulently expansionist movement that had ascended to power in the run up to World War I. Among the objectives and ambitions of the wartime Ittihadist Government was restoring the waning grandeur of the Ottoman Empire by eliminating threats undermining it as well ensuring that it firmly incorporated all Turkic peoples.

[15] As Winston Churchill wrote:

> In 1915 the Turkish government began and ruthlessly carried out the infamous general massacre and deportation of Armenians in Asia Minor…the clearance of the race from Asia Minor was about as complete as such an act, on a scale so great, could well be. There is no reasonable doubt that this crime was planned and executed for political reasons. The opportunity presented itself for clearing Turkish soil of a Christian race opposed to all Turkish ambitions, cherishing national ambitions that could be satisfied only at the expense of Turkey, and planted geographically between Turkish and Caucasian Moslems.

Winston Churchill, *The World Crisis: The Aftermath* (Thornton Butterworth, 1929) 405.

[16] Ibid 367.

[17] E L Woodward and R Butler (eds), *Documents on British Foreign Policy 1919–1939* (HMSO, First Series, 1952) Vol 4 (Statement of the then British Foreign Minister George Curzon, 4 July 1919), 661.

[18] *Declaration of France, Great Britain and Russia*, 24 May 1915, quoted in Egon Schwelb, 'Crimes Against Humanity' (1946) 23 *British Year Book of International Law*, 178, 181.

were determined to initiate criminal proceedings against Turkish officials suspected of complicity in the war of aggression *and* the Armenian Genocide. The task of considering the various possibilities was delegated to the Commission on Responsibility of the Authors of the War and on Enforcement of Penalties (the 'Allied Commission').[19] The Commission commenced its work by taking specific cognisance of Turkish massacres of hundreds of thousands of Armenians as part of a state policy of *resolving* the 'Armenian Question'.

The scale of the massacres was such that a majority of the members of the Allied Commission were of the opinion that the Hague Convention (IV) principle, which allowed for reliance upon 'the laws of humanity' and 'dictates of public conscience',[20] whenever clearly defined standards and regulations to deal with grave offences were lacking, sufficed to cover the perpetration of the massacres within the rubric of 'crimes against humanity'.[21] On 5 March 1919, the Commission tabled a report defining this offence.[22] The report specified the following violations against civilian populations: systematic terror; murders and massacres; dishonouring of women; confiscation of private property; pillage; seizing of goods belonging to communities, educational establishments and charities; arbitrary destruction of public and private goods; deportation and forced labour; execution of civilians under false allegations of war crimes; and violations against civilians as well as military personnel. The Commission's final report, dated 29 March 1919, spoke of 'the clear dictates of humanity' which were abused 'by the Central Powers by barbarous or illegitimate methods' including 'the violation of . . . the laws of humanity'. The report concluded that 'all persons belonging to enemy countries . . . who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution'.[23]

Beginning in January 1919, Turkish authorities, directed and often pressured by Allied authorities in Istanbul, arrested and detained scores of wartime political and military leaders. Those arrested comprised four groups: (1) the members of Ittihad's Central Committee; (2) war-time cabinet ministers; (3) a host of provincial governors; and (4) high-ranking military officers. The suspects were transferred to a detention facility in a military prison maintained by the Turkish Defence Ministry.[24] Subsequently, forty-one of the suspects were released by Turkish authorities on the basis that they were innocent. Admiral Somerset Gough-Calthorpe,

[19] The Commission was comprised of two members from each of the five Great Powers: the United States of America, the British Empire, France, Italy, and Japan. In additional the Commission co-opted five representatives—one each from Belgium, Greece, Poland, Romania, and Serbia—the Associated Powers that together with the Entente Powers made up the Allied Power alliance. Carnegie Endowment for International Peace, *The Treaties of Peace 1919-1923* (Carnegie Endowment for International Peace, 1924) 3.

[20] *Convention Respecting the Laws and Customs of War on Land*, 18 October, 1907, Preamble, 36 Stat 2277, 2779–80, 1 Bevans 631, 632.

[21] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 'Report Presented to the Preliminary Peace Conference, 29 March 1919' (1920) 14 *American Journal of International Law* 95.

[22] Ibid. [23] Ibid.

[24] Of these, twenty-six were ordered released by the Court Martial itself with the assertion, 'There is no case against them.' *Spectateur D'orient*, (Istanbul) 21 May 1919.

the senior British military officer involved in negotiating the terms of Turkey's surrender (as well serving as the British High Commissioner to Turkey), informed London with regard to the released suspects that 'there was every reason to believe, [they] were guilty of the most heinous crimes…mainly in connection with massacres'.[25] On 28 May 1919, sixty-seven detainees were seized from the Istanbul military prison in a surprise swoop by the British. Twelve of the prisoners, mostly ex-ministers, were taken to the island of Mudros, the rest to Malta.[26] The twelve ministers were eventually transferred to Malta, where the number of prisoners rose to 118 by August 1920.[27] However the British raid and repeated diplomatic pressure served to harden the resolve of the ascendant Turkish ultra-nationalist Kemalist government[28] in the face of requests to hand over the rest of the offenders in their custody for trial before an inter-Allied tribunal.[29]

(3) Peace Treaty of Sèvres: translucent accountability and opaque enforceability

A peace treaty was presented to Turkey on 11 May 1920, and signed four months later at Sèvres, France.[30] The treaty contained several articles providing for the trial and punishment of those responsible for the Armenian Genocide. The provisions obligated Turkey to recognize the prosecution of alleged perpetrators by the Allied powers and extended the obligation to include the surrender of those identified.

[25] British Foreign Office Papers, FO 371/4174/88761 (folio 9) (30 May 1919) (Foreign Office (FO) Archives. Public Record Office, London).

[26] The British Foreign Office Near East specialist declared, 'There is probably not one of these prisoners who does not deserve a long term of imprisonment if not capital punishment.' British Foreign Office Papers, FO 371/6509/E8745 (folios 23–24); See also Vahakn N Dadrian, 'Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications' (1989) 14 *Yale Journal of International Law* 221, 286.

[27] Referring to the Malta exiles, a British Foreign Office Near East specialist declared: 'There is probably not one of these prisoners who does not deserve a long term of imprisonment if not capital punishment.' British Foreign Office Papers, FO 371/6509/E8745 (folios 23-24).

[28] The Kemalists were trying to mitigate the consequences of the total collapse of the Ottoman Empire subsequent to the World War I military defeat by establishing a secular Turkish republic bereft of the expansionist, ambitions of the wartime Ittihadist Government which sought to not only prevent the collapse of the Ottoman Empire but to ensure that it firmly incorporated all Turkic peoples.

[29] Turkey asserted that such a surrender of Turkish subjects contradicted the sovereign rights of the Ottoman Empire as recognised by England in the Armistice Agreement. In the words of the Turkish Foreign Minister:

> compliance with the demand for surrender by the Turkish Government would be in direct contradiction with its sovereign rights in view of the fact that by international law each State has [the] right to try its subjects for crimes or misdemeanours committed in its own territory by its own tribunals. Moreover, His Britannic Majesty having by conclusion of an armistice with the Ottoman Empire recognised [the] latter as a *de facto* and *de jure* sovereign State, it is incontestably evident that the Imperial Government possesses all the prerogatives for freely exercising [the] principles inherent in its sovereignty.
>
> British Foreign Office Papers, FO 608/244/3749 (folio 315) (Rear Admiral Richard Webb's 19 February 1919 telegram to London). Webb was then also serving as the British Assistant High Commissioner to Turkey.

[30] *Peace Treaty of Sevres*, 10 August 1920, reprinted in '*Treaty of Peace Between the Allied Powers and Turkey*' (1921) 15 *American Journal of International Law* 179 (Supp).

Under Article 226, the Turkish government recognized 'the right of trial and punishment by the Allied Powers, notwithstanding any proceedings or prosecution before a tribunal in Turkey'.[31] Turkey was required to surrender 'all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by rank, office or employment which they held under Turkish authorities'.[32] Under Article 230, Turkey was further obliged to hand over to the Allied Powers the persons responsible for the massacres committed during the state of war on territory which formed part of the Turkish Empire as of 1 August 1914.[33]

Disagreements, feuds, and rivalries among the Allies, on the one hand, and general war-weariness on the other, was to undermine unity and weakened resolve in pursuing and holding Turkey accountable for its wartime atrocities. Consequently, a withdrawal of all occupation forces commenced as negotiations got underway for a prisoner exchange. Yielding further to the pressures of the now firmly established Kemalist government, the Allied Powers undercut (and all but discarded) the Peace Treaty of Sèvres when they presented the Treaty of Lausanne for signing.[34] This treaty replaced the Peace Treaty of Sèvres and avoided the subject of war crimes and massacres—marking an ignominious triumph of impunity over international justice. The Treaty of Lausanne effectively marked the end of the pursuit of justice through supranational penal process.[35] However, though the international initiative had effectively collapsed by 1921, domestic pressure and political expedience was already playing a key role in delivering a measure of justice through a series of domestic trials commencing in Turkey as early as 1919 (prior to the peace treaties).

(4) Seeking redemption? Domestic Turkish justice

On the night of 1–2 November 1918, seven top leaders of the wartime Ittihadist Party surreptitiously fled from Istanbul. Days later a Turkish parliamentarian introduced a motion for the trial before the High Court of wartime cabinet ministers.[36] The motion enumerated ten charges that covered alleged misdeeds related to Turkish participation in World War I encompassing aggression, military

[31] *Peace Treaty of Sevres*, 10 August 1920, reprinted in 'Treaty of Peace Between the Allied Powers and Turkey' (1921) 15 *American Journal of International Law* 179 (Supp); see also James F Willis, *Prologue To Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (Greenwood Press, 1982) 180.

[32] *Peace Treaty of Sevres*, 10 August 1920, reprinted in 'Treaty of Peace Between the Allied Powers and Turkey', 15 *American Journal of International Law* 179 (Supp 1921).

[33] It was further stipulated that '[t]he Allied powers reserve to themselves the right to designate the tribunal, which shall try the persons so accused, and the Turkish Government undertakes to recognise such tribunal.' Ibid 181.

[34] *Treaty of Lausanne*, 28 LNTS 12 reprinted in (1924) 18 *American Journal of International L*aw 1 (Supp).

[35] Vahakn N Dadrian, 'Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications' (1989) 14 *Yale Journal of International Law* 221, 309–10.

[36] Johannes Lepsius, *Deutschland und Armenien, 1914-1918: Sammlung Diplomatischer Aktenstucke* [*Germany and Armenia, 1914–1918: A Collection of Diplomatic Documents*] (Tempelverlag, 1919) 111.

incompetence, political abuses, and economic crimes. In particular, two of the charges focused on the Armenian Genocide and challenged the enactment of the Temporary Laws.[37] It asserted that the deportations were contrary to the spirit and letter of the Constitution meaning that associated 'orders and instructions' were contrary to 'the rules of law and humanity'. Ensuing debate resulted in the establishment of a Select Parliamentary Investigation Committee. In the next five weeks, 'the Committee conducted fourteen hearings in which it interrogated fifteen ministers, including two Seyhulislams. In addition to the revelations and confessions exacted from the ministers during these hearings, the Committee also secured a number of documents, some of which were top-secret orders and instructions regarding the massacres.'[38]

Parallel to the work of the Select Committee, an Administration Inquiry Commission was established on 23 November 1918 and mandated to investigate misdeeds by administrative and military officers. It was vested with broad powers pursuant to the Ottoman Code of Criminal Procedures.[39] However, in large part owing to residual power of the Ittihadists, the work of the Select Parliamentary Committee was proving ineffectual. Its slow progress in investigation gave rise to angst. The Sultan's government was faced with opposition from Ittihadists and ascendant Kemalists and was keen to placate Western powers who had deployed troops and seemed inclined to maintain a military presence in Turkey, something that galled the citizenry and stood to compromise Turkey's sovereignty and his authority.[40] Bowing to political pressure and a restive public, the Committee was dissolved by Sultan Mehmed VI (Head of State). The main focus of the prosecutorial case now shifted singularly to the Administration Inquiry Commission. It proved to be the main vehicle that would collect the relevant evidence to facilitate prosecutions. The Commission compiled dossiers on the suspects and concluded with a recommendation that evidence was sufficient to warrant the commencement of criminal proceedings against them. In early 1919, the Sultan authorized a law to establish an Extraordinary Court Martial to try the alleged perpetrators noting

[37] In a Memorandum dated 26 May 1915, the Interior Minister had requested from the Grand Vezir the enactment through the Cabinet of a special law authorizing deportations. The Cabinet acted on 30 May through promulgation of the Temporary Law of Deportation. Pursuant to this law, alleging treasonable acts, separatism, and other assorted acts by the Armenians as a national minority, the Ottoman authorities ordered, for national security reasons, the wholesale deportation of Armenians, a measure that was later extended to virtually all of the Empire's Armenian population. It is to be noted that though Armenians were the main victims (in size and numbers), the Greek and Assyrian Christian groups also suffered. See, eg, R. Hovannisian, *Armenia on The Road to Independence, 1918* (Berkeley, CA: University of California Press, 1967), 51.

[38] Vahakn N Dadrian, 'Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications' (1989) 14 *Yale Journal of International Law*, 221, 294.

[39] Its mandate was premised on paragraphs 47, 75 and 87. J.A. Bucknill and H.A.S. Utidjian (translation), *The Imperial Ottoman Penal Code: A Translation* (Oxford: Oxford University Press, 1913).

[40] Ittihadism should not be confused with Kemalism. The former was bent on re-establishing itself in post-war Turkey without relinquishing its pan-Islamic ambitions. The latter was trying to mitigate the disastrous consequences of a military defeat by confronting the victorious allies as a provincial insurgency, unless the allies were willing to recognize the sovereign rights of a new Turkish republic, bereft of expansionist ambitions.

that the offences in question amounted to 'crimes against humanity'. Defendants were classified as either principal co-perpetrators or accessories.[41] The main trial was based at the Military Court in Istanbul; however, there were six other regional courts operating in parallel. The chapter now turns to consider the conduct of the trials themselves.

(5) Seeking a measure of justice: militarism and genocide on trial

(a) The key trials

The key indictment focused on leaders of the wartime ruling Ittihad Party. There were three principal charges: conspiracy, premeditation and intent, and murder and personal responsibility. The Prosecutor-General averred that the Party's objectives and methods were criminal citing secret memoranda emanating from its Central Committee on the question of the entry into war as part of the solution of the 'Armenian Question'. Included in the charge were officials of the Defence Ministry's War Office and the Interior Ministry.[42] The defendants were accused of having deliberately engineered Turkey's entry into the war 'by recourse to a number of vile tricks and deceitful means' and of using 'this vantage ground to carry out their secret intentions—massacre of the Armenians'.[43]

On the question of premeditation and intent, the Indictment alleged that '[t]he massacre and destruction of the Armenians were the result of decisions by the Central Committee of Ittihad'.[44] The Indictment noted that the 'release [of] gangs of convicts from the prisons', ostensibly for combat duty, was a cover as they were really destined for 'massacre' duties in the Special Organization. This Organization was essentially a death squad. Pre-empting the act of state defence, the Indictment elaborated that its basis was *personal responsibility* of the defendants as members of

[41] The criminal categories included:

1. the central instigators of crimes against Armenians;
2. those who worked under the auspices of those mainly responsible, such as influential members of the Central Committee of the Committee of Union and Progress (The Iitihadist Party);
3. members of clandestine organizations, such as the Special Organization, along with high-ranking military officials and criminals set free from prison;
4. those who had enriched themselves or otherwise profited from these crimes.

Raymond Kevorkian, The Extermination of Ottoman Armenians by the Young Turk Regime (1915–16), Online Encyclopedia of Mass Violence, [online] 3 June 2008, available at <http://www.massviolence.org/The-Extermination-of-Ottoman-Armenians-by-the-Young-Turk-Regime>, accessed 12 February 2011.

[42] It was the War Office that had managed the Special Organization, whose key task was dealing with the 'Armenian question'. It was noted that: 'The evidence gathered yields the picture of a party whose moral personality is mired in an unending chain of bloodthirstiness, plunder and abuses' (Vahakn N. Dadrian, 'Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications' (1989) 14 *Yale Journal of International Law*, 221, 309–10).

[43] *Takvimi Vekayi*, No. 3540 at 4. (Takvimi Vekayi was the Official Newspaper of the Ottoman Empire. Commencing publication in 1831, it would go on to occupy a special place and the main source of government news).

[44] *Takvimi Vekayi*, No. 3540 at 8.

the Party's Central Committee.[45] In the conviction and sentencing, the Court relied on Articles 45, 55, and 170 of the Ottoman Penal Code. The Court found the defendants guilty of orchestrating the entry of Turkey into World War I and of committing the genocide of the Armenians. The defendants were condemned to death *in absentia*.

(b) The Yozgat trials

The Yozgat trial series, commencing in early 1919, featured senior administrative officials and regional army commanders.[46] The principal charge was the deportation and subsequent massacre of the region's Armenians. The officials were complicit in the deportation of an astonishing ninety-five per cent of the region's Armenian population, almost all of whom could not subsequently be accounted for or traced. The Yozgat verdict declared, 'there can be no doubt and no hesitation' about the real purpose behind the deportations.[47] The Court rejected the Attorney General's proposal to rely on Article 56 of the Ottoman Penal Code.[48] This would have relegated the atrocities to domestic law violations in the course of civil upheaval thus providing a measure of legitimacy to the *relocation* programme. The Court instead relied on Articles 45 and 170 of the Ottoman Penal Code and Article 171 of the Military Code. The defendants were sentenced to death.

(c) The Trabzon trials

On trial were seven defendants, five present and two absent. The defendants ranged from administrators to police and military officers. The Armenian deportees, the Court found, were handed over to the Special Organization by the War Office as part of its central action plan to *solve* the 'Armenian Question'. Many Armenian deportees in this particular case met their fate through the sinking of transport ships in the Black Sea. It also found that the administrative officials colluded in plundering and profiteering from the property confiscated from deportees. The judgment averred that the events in question were contrary to provisions of the Ottoman Civil Code and additionally also breached Islamic tenets. It noted that from a legal and moral perspective all Ottoman citizens had the right 'to the protection of their honour, lives and properties, without discrimination, by the officials of the state, that protection being a matter of duty'.[49] The Court found five of the defendants guilty (two *in absentia*) and acquitted another two.

45 J A Bucknill and H A S Utidjian (trans), *The Imperial Ottoman Penal Code; A Translation* (Oxford University Press, 1913).

46 Vahakhn N Dadrian, 'The Turkish Military Tribunal's Prosecution of the Author's of the Armenian Genocide: Four Major Court-Martial Series' (1997) 11 *Holocaust & Genocide Studies* 28, 33.

47 Vahakhn N Dadrian, 'The Turkish Military Tribunal's Prosecution of the Author's of the Armenian Genocide: Four Major Court-Martial Series' (1997) 11 *Holocaust & Genocide Studies* 28, 339.

48 J A Bucknill and H A S Utidjian (trans), *The Imperial Ottoman Penal Code; A Translation* (Oxford University Press, 1913).

49 See e.g. Vahakn N Dadrian, 'Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications' (1989) 14 *Yale Journal of International Law* 221,

(d) The Ittihadist and wartime cabinet ministers' trials

These two trial series specifically targeted the officials at the apex of both the Ittihadist Party and government. One focused on the senior office bearers of the Ittihadist Party and the second targeted a host of senior wartime ministers and senior military commanders. These two series of trials together tried over thirty-five defendants. The bulk of these defendants (particularly in the wartime cabinet ministers' trials) were tried *in absentia*. Charges included responsibility for Turkey's entry into the war and the alleged role of the accused as principal architects responsible for sanctioning and implementing a national drive to atrocity. The series of trials dealing with the senior party officials deemed them to have been accessories and therefore imposed lighter sentences. The series dealing with the ministers and military officers by virtue of their authority and positions of power prosecuted them as principals. Several death sentences and lengthy prison sentences were handed down.

These were clearly important trials of some consequence. Why, then, have these important trials languished in archival records? Several general reasons account for this unfortunate reality.

First, with the end of World War I, the Ottoman Empire had collapsed and the focus externally (among the Allies) and internally (in Turkey)—crowding out wider national and international knowledge of the trials underway—was on the escalating domestic Turkish insurgency. The Allies were finding it difficult to read the geo-political landscape and were politically uncertain as to their role in reconstituting a former empire that occupied a pivotal physical and socio-political position. At the same time, internally, leading and ascendant national figures were engaged in settling political scores and/or consolidating their power and influence. Second, when the Republic of Turkey emerged from the ruins of the Ottoman Empire after the triumph of the Kemalists over the ancien régime, the government's focus was firmly on consolidating its power and crafting a new national identity. This meant that the Armenian Genocide was now wrapped up in geo-politics, diplomatic posturing and war revisionism. The aim was to push the dark gloom of the atrocities from both the national debate and international focus. Third, and paradoxically, the subsequent focus on the genocide (the second most studied after the Holocaust), in the face of an unrepentant Turkish Republic that sought to airbrush the massacres, stifled widespread studies and dissemination of the very trials that had delivered a measure of justice. The trials have in essence been pushed to the periphery by the success in unearthing the political and practical facts of the massacres and hence have been seen more through the lens of internecine politics and not nearly enough as an important event that delivered a measure of historical record and justice. In sum the continued sensitivity by Turkey to the Armenian genocide has a threefold effect—Turkey focuses on rebuffing accounts of the genocide, other states focus on proving it did happen and disseminating records, with the Turkish national war crimes trails remaining caught in between.

In the decades after the conclusion of the Turkish national trials, no state undertook large scale domestic trials of its nationals for international crimes. It was to be

seven decades before Ethiopia undertook trials on such a scale. In the meantime the prosecution was largely left to the limited efforts by international tribunals (Nuremberg and Tokyo at the end of World War II and attendant national trials under an international law mandate) and in the early 1990s the work of the ad hoc international criminal tribunals for Yugoslavia and Rwanda. Finally, in 1994 after close to three decades of brutal Communist rule in Ethiopia, the dark years of the Red Terror (a systematic, bureaucratic system of murder and extermination) were subjected to a judicial intervention aimed at dealing with thousands of cases of murder, torture and imprisonment of 'counter-revolutionaries'. The trials—in which some 2000 people were arraigned—lasted several years. It constituted the most extensive judgment of human rights violations since the trials at the end of the World War II. This chapter now turns to review the large-scale Ethiopian domestic trials that sought to deliver justice and a measure of catharsis to a nation broken by brutality and rivers of blood.

(III) Ethiopia's Red Terror Campaign and the Search for Justice

(1) 'Draining the sea to catch the fish': a regime's quest to 'eradicate' all opposition

In the early 1970s severe famine beset parts of Ethiopia. This was to be the trigger for years of grievances related to socio-economic and political exclusion. On one hand, the peasantry was embittered over the feudal system of land ownership. The military was demanding higher wages. And a hungry citizenry saw already poor living conditions plummet further as the economy nosedived and inflation soared. By 1974 the imperial government seemed unresponsive to the economic and political needs of its people. It was on the back of acute economic poverty and political suppression that mass uprisings erupted against the rule of Emperor Haile Selassie I. The Provisional Military Administration Council of Ethiopia (the Derg)[50] was formed by officers of the Ethiopian Army. The Derg, while initially an apolitical body, seized the opportunity presented by an enfeebled aristocratic order and adopted a virulent form of socialism. The Derg seized power, suspended the Constitution and established a military government.

The first victims of the Derg were figures who represented the face of the old ruling class. It therefore summarily executed sixty officials of the former imperial government.[51] This event marked the beginning of seventeen years of state-sponsored terror and violence.[52] After eliminating the 'aristocrats' and 'the land owners', the Derg turned its attentions to 'anti-revolutionaries' and 'anti-unity' elements. Even

[50] Please refer to footnote 7 above which elaborates on this.

[51] T S Engelschin 'Prosecutions Of War Crimes And Violations Of Human Rights In Ethiopia', (1994) 8 *Yearbook of African Law* 43.

[52] Girmachew A Aneme, 'Apology And Trials: The Case Of The Red Terror Trials In Ethiopia' (2006) 6 *African Human Rights Law Journal* 64, 65.

as the Derg was consolidating itself, an internecine power struggle was in the making within its ranks. In the first three years of its rule it had two leaders: Generals Amman Andom and Teferi Banti. It was however a lower ranking military officer—Colonel Mengistu Haile Mariam—who possessed the greatest influence and power within the Derg. In 1977, Colonel Mengistu finally assumed formal power after outmanoeuvring his opponents.

Mengistu quickly moved to cement his grip on power by focusing on civilian opposition elements as well as any other entities perceived as enemies of the revolution. To assist in the government's 'anti-revolutionary' campaign, the Mengistu regime issued arms to members of the Urban Dweller's Associations ('kebeles') whose mandate was to kill any individuals opposed to the regime or lacking zeal in professing the government's Marxist–Leninist ideology.[53] Hundreds of suspected political opponents were murdered and their bodies dumped in the streets as a warning to others. The purges intensified as the unbridled brutality caused segments of the population to crystallize into diehard opposition. An Amnesty International report estimated that the total number of persons killed by the end of the initial round of the Red Terror campaign (1977–81) ranged from 150,000 to 200,000.[54] This was to be symptomatic of the rest of Mengistu's rule.

In the early 1980s, the Derg ratcheted up its bloody campaign by 'manufacturing' hunger as part of its counter-insurgency strategy in regions that opposed its rule.[55] Commencing in 1983 the Ethiopian government took advantage of a pre-existing severe drought to direct starvation against insurgent populations in its northern provinces. In addition to this, the military pursued a murderous campaign targeting rebel strongholds: bombing markets, placing restrictions on movement and trade, forcibly relocating populations and actively interfering with international humanitarian relief efforts. It is estimated that the artificial famine and forced relocations ultimately killed 400,000 people, adding to the Red Terror campaign toll of the late 1970s.[56] Overall during the rule of Mengistu some 1.5 million Ethiopians are estimated to have been killed (by famine or force), disappeared, or injured (many maimed).

By l989, the main nodes of the Ethiopian insurgency against the Mengistu regime had coalesced as the Ethiopian People's Revolutionary Democratic Front (EPRDF).[57] Progressively, the EPRDF secured military victories in the

[53] See generally Julie V Mayfield, 'The Prosecution of War Crimes and Respect for Human Rights: Ethiopia's Balancing Act', (1995) 9 *Emory International Law Review* 553, 559; Edmund J Keller, *Revolutionary Ethiopia* (Indiana University Press, 1988).

[54] See generally Julie V Mayfield, 'The Prosecution of War Crimes and Respect for Human Rights: Ethiopia's Balancing Act', (1995) 9 *Emory International Law Review* 553, 566.

[55] See eg Africa Watch, *Evil Days: Thirty Years of War and Famine in Ethiopia* (1991) 139 *available at* <http://www.hrw.org/node/78194> accessed 6 May 2013.

[56] See eg Africa Watch, *Evil Days: Thirty Years of War and Famine in Ethiopia* (1991) 139 *available at* <http://www.hrw.org/node/78194> accessed 6 May 2013.

[57] The EPRDF was made up of the Tigrayan People's Liberation Front, the Amhara National Democratic, Movement, the Oromo Peoples Democratic Organization, and the Ethiopian Democratic Officers.

countryside and gradually prevailed over government troops. By early 1991 it had encircled Addis Abba. In a scene similar to that which occurred in Turkey, Mengistu fled the country along with leading members of the Derg. On 8 May 1991, the Mengistu regime officially fell. The triumphant EPRDF began arresting and detaining individuals suspected of violating human rights during the Derg era. In what was to be a landmark move to accountability, the following year, the transitional government established the Special Prosecutor's Office (SPO) with a mandate to investigate and prosecute the massive human rights violations of the Derg era.[58]

(2) Seeking catharsis: the Ethiopian 'Red Terror' domestic trials

The SPO faced the dilemma of whether domestic or international law should apply in any prosecutions of Derg perpetrators. Under the Penal Code of the Empire of Ethiopia of 1957,[59] most of the detainees could be charged with common crimes such as homicide, wilful injury, assault, coercion, illegal restraints, abuse of power, use of improper methods, and conspiracy if the actions were viewed as the result of internal disturbances. However, the scale of the atrocities was such that they amounted to widespread and systematic human rights violations which amounted to crimes under international law which were incidentally also covered by the Ethiopian Penal Code. The Penal Code, in Articles 281–286, enshrined offences against the state or against national or international interests that embedded international norms pertaining to genocide, crimes against humanity and war crimes.[60] The defendants were classified into three main categories by the SPO: policy makers, field commanders, and material offenders.[61] The charges brought against the defendants included genocide and crimes against humanity, torture, murder, unlawful detention, rape, forced disappearances, abuse of power, and war crimes. The main charge against the top officials of the Derg regime was the crime of genocide in violation of Article 281 of the 1957 Ethiopian Penal Code.[62]

In 1994, the SPO filed the first charges against seventy-three Derg members. Mengistu and seventy-two of the Derg's leading officials were among the indictees. The lengthy charge sheet detailed more than 200 acts of genocide and crimes against humanity involving tens of thousands of victims. The trial got off to a wobbly start owing to scarcity of resources—legal, technical and infrastructural. Despite these early setbacks, the SPO pushed ahead with an ambitious

[58] *Proclamation 40/92*, the Proclamation for the Establishment of the Special Prosecutor's Office, 1992.

[59] Penal Code of The Empire of Ethiopia of 1957, Proclamation No. 158 of 1957, *Negarit Gazeta*, Extraordinary Issue No. 1 of 1957, 23 July 1957.

[60] Penal Code of The Empire of Ethiopia of 1957, Proclamation No. 158 of 1957, *Negarit Gazeta*, Extraordinary Issue No. 1 of 1957, 23 July 1957.

[61] See generally 'Apology and Trials: The Case of the Red Terror Trials in Ethiopia', (2006) 6 *African Human Rights Law Journal* 64, 76.

[62] Penal Code of The Empire of Ethiopia of 1957, Proclamation No. 158 of 1957, *Negarit Gazeta*, Extraordinary Issue No. 1 of 1957, 23 July 1957, Article 281.

investigation mandate. Three years later, after intensive investigation, the SPO filed further charges against a total of 5,198 high and middle ranking public and military officials of the former government. The Special Prosecutor requested that trial courts take into account various aggravating circumstances.[63] It was with this in mind and in accordance with the terms of Articles 84 and 85 of the Ethiopian Criminal Code that the Court would eventually hand down very stiff sentences.

The trials of leading government and military personnel occurred at the Ethiopian Federal High Court. There were numerous other parallel trials throughout the country both at the Federal High Court divisions and the supreme courts of the regional states. The decision to disperse the trials was made both for the sake of convenience and in order to try some of the accused at locations where the crimes had been committed.[64] This dynamic was much like the Turkish trials which (as mentioned above) were held in a series of trials in regional courts dispersed across several provinces.

The main trial was naturally that of Mengistu and his top lieutenants.[65] The charge sheet and evidence list comprised more than 5,000 pages. The evidence against Mengistu included signed execution orders, videos of torture sessions and personal testimonies. Of the seventy-three accused, fourteen had died and only thirty-three were present in court. Mengistu was among twenty-five defendants tried *in absentia* for their role in the killing of thousands of people during the brutal rule of the Derg. On 12 December 2006, the trial against Mengistu and his co-accused finally concluded after more than a decade. In January 2007, the Ethiopian Federal High Court convicted him and his co-accused of genocide, crimes against humanity and wilful bodily injury. He was sentenced to life in prison with many of his co-accused receiving the same sentence for, among other things, direct responsibility for the deaths of 2,000 people and the torture of at least 2,400. Following an appeal by the prosecution on 26 May 2008, Mengistu's previous sentence of life imprisonment was substituted with a death sentence by Ethiopia's High Court. Eighteen of his co-defendants also saw their life sentences substituted for the death penalty. In the same year that Mengistu's life imprisonment was revised upwards, nineteen other persons were convicted on 5 April 2008.

[63] These aggravating circumstances, amongst others, were:

1. the accused intended, planned, instigated and assisted in the execution of the plan using the country's resources, institutions and government power;
2. The victims were in the custody of the institutions run by the accused;
3. The commission of the crimes under such circumstances shows that the accused were willing and had the resolve to commit the crimes;

Penal Code of the Empire of Ethiopia of 1957, Article 281 (*Negarit Gazeta*, Extraordinary Issue No 1 of 1957), Articles 84 and 85.

[64] Articles 78(2) and 80(2) of the Constitution of the Federal Democratic Republic of Ethiopia.

[65] *Special Prosecutor v. Colonel Mengistu Hailamariam et al.*, File No. 1/87, Ethiopian Federal High Court.

Ultimately, a total of 5,119 persons were tried for involvement in the terror campaign by the Derg government with crimes ranging from genocide and war crimes to crimes against humanity and other serious human rights violations with 3,583 convicted and sentenced to death, life in prison, and a range of lengthy prison sentences.[66] The scale and the nature of the trials was unprecedented not only in Africa but around the globe.

As with the Turkish national trials, the puzzle is why the largest trials of international crimes since World War II remain at the periphery of history. Several reasons can be ventured. Surprisingly, despite several decades and evident differences (predominantly time and geographical location), in general terms, these mirror those of the Turkish national trials with geo-political considerations, rebirth of nationalism, the residual power of ousted elites and a reassertion of territorial sovereignty as a fulcrum. To begin with, the trials were held in the shadow of Ethiopia/Eritrea war tensions. Despite Eritrea formally becoming independent in 1993, the extremely volatile relations between the two neighbours (before, then and thereafter) remained a headache for the continent and the world at large. Second in the early 1990s a number of dictators faced the challenge of multi-party politics. Mengistu Haile Mariam had belonged to the 'African dictators club' and many of his cronies still in power felt aggrieved by the fall from power of one of their own and, no doubt, the prospect of the legal consequences. The incoming government was well aware that the deposed leader still had very powerful friends and they did not wish to antagonize them. Hence in an act of crude diplomacy, the new government was keen to downplay the scale and remarkable achievements of the trials. As ensuing years would show, this stance was to suit Meles Zenawi, a liberator who was to tinge his rule with some of the authoritarian excess of his predecessor, Mengistu. Thus the trials were wrapped in the opaque prism of politics and national healing (transitional justice) for years and only in the twenty-first century are they gaining the publicity they deserve.

(IV) Conclusion

The prosecution of the Turkish leaders implicated in the commission of international crimes before the Turkish Courts-Martial, which resulted in a series of indictments, verdicts and sentences, was of extraordinary significance. It was to be another eight decades before another nation—Ethiopia—undertook domestic trials targeting international crimes on the same scale. While both domestic trials were driven by political expedience, the most important thing was that they

[66] Firew Tiba, 'The Trial of Mengistu and Other Derg Members for Genocide, Torture and Summary Executions in Ethiopia' in Chacha Murungu and Japhet Biegon (eds), *Prosecuting International Crimes in Africa* (Pretoria University Law Press, 2011) 163, 168; Luelseged Degu, Report from Special Prosecutor's Office of Ethiopia: Half-way Transitional Justice (11 February 2010) *available at* <http://es.ictj.org/en/news/coverage/article/3447.html> accessed 5 February 2013.

delivered a measure of justice and importantly co-opted international law in the implementation of domestic penal codes. Though imperfect, they signified recognition by national governments that justice through trial was essential to address widespread and systematic breaches of international norms. Importantly, it was a historic 'vanguard' in the blending of the norms and doctrines of international criminal law with domestic penal codes.

15

Mass Trials and Modes of Criminal Responsibility for International Crimes: The Case of Ethiopia

*Firew Kebede Tiba**

(I) Introduction

Ethiopia responded to the legacy of mass atrocities committed during the early years (1974–1980) of the communist rule of Colonel Mengistu Hailemariam and his associates by instituting a project of mass prosecution. The process reached a climax on 26 May 2008 with the Federal Supreme Court decision in the case of *Special Prosecutor v Colonel Mengistu Hailemariam & Others*, which upheld the Special Prosecutor's argument that the life sentence imposed by the Federal High Court was inadequate. The convictions included the crimes of genocide, aggravated homicide, torture, illegal imprisonment and abuse of power. The Court did not elucidate or advance an appropriate theory concerning the mode of criminal responsibility required, even though the main charges generally relied on the assumption that the accused participated in the alleged crimes as co-perpetrators. Instead, the Court merely asserted that their culpability arose from being members of the Provisional Military Administration Council (Derg) and from the fact that they owned or adopted its decisions as their own without protesting for seventeen years.[1]

Although the judicial process has been overtaken by a political decision to commute the death sentences to life in prison with parole, the *Mengistu* trial remains significant on many levels.[2] Fundamentally, the trial represents the first ever nationally conceived and implemented accountability program in Sub-Saharan

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[1] *Special Prosecutor v Colonel Mengitsu Hailemariam & Others*, Judgment, Criminal File No. 30181, Federal Supreme Court, 26 May 2008.

[2] At the prompting of religious leaders, the Head of State President Girma Woldegiorgis exercised his constitutional prerogative on 1 June 2011 and commuted the death sentence imposed on twenty-three former Derg officials convicted of genocide and other crimes. Most of them are now released on parole having served the maximum prison term possible for life sentence under Ethiopian law.

Africa in the wake of a large-scale atrocity. The magnitude of the trial alone, with all its imperfections, entitles the process to a special place in the history of national accountability projects. Unfortunately, for various reasons, the story of the trial has not been told adequately. Some of the reasons for this will be highlighted in this chapter.[3]

Needless to say, organizing a large-scale criminal trial is a challenging task anywhere in the world. The difficulty is exponentially multiplied in a developing country like Ethiopia where the legal system is chronically under-resourced. Such trials also risk the possibility of collective condemnation or the accused being found guilty by association. In this case alone, 106 accused were joined together in a single criminal trial. By contrast, the International Military Tribunal at Nuremberg (IMT) tried twenty-four of the most wanted Nazi leaders, while the maximum number of accused joined in a single trial at the International Criminal Tribunal for the former Yugoslavia (ICTY) has been seven. This demonstrates how unwieldy the Ethiopian counterpart has been when compared to similar large-scale trials.

This chapter seeks to challenge the approach taken in the decisions of the Ethiopian federal courts in light of modes of criminal responsibility under international criminal law.[4] Specifically, it will examine the objections raised by the accused about their convictions solely on account of them being members of the Derg. The chapter argues that courts failed to draw on international criminal law jurisprudence (such as the concept of joint criminal enterprise or alternative doctrines) in finding the defendants guilty. The muddled conceptual approach to modes of criminal responsibility in these trials has arguably undermined the quality of the decision and its significance for international criminal law. Furthermore, the Court's refusal to order separate trials has also made it difficult for the accused to mount a proper defence against the charges.

(II) The Ethiopian Red Terror

The full scale of atrocities committed in Ethiopia following the overthrow of the imperial regime in 1974 has yet to be fully told. The 1974 revolution was

[3] Throughout this chapter, reference is made to the Mengistu trial unless the context suggests that reference is being made to the entire prosecution programme, which encompassed a number of separate trials that were conducted in other parts of the country by regional courts. Unless specified otherwise, all court decisions quoted in this chapter are those of the Federal High and Supreme Courts in the Mengistu trial. Unfortunately, the non-existence of accessible documentation on the regional trials has made impossible the task of analysing these other low-profile cases.

[4] For literature on other aspects of the trial see: Firew Kebede Tiba, 'The Mengistu Hailemariam Genocide Trial in Ethiopia', *Journal of International Criminal Justice*, *5* (2007), 513–28; Firew Kebede Tiba, 'Prosecuting International Crimes in Domestic Courts: The Trial of Mengistu and Other Derg Members for Genocide, Torture and Summary Executions' in Chacha Bhoke Murungu and Japhet Biegon (eds), *Prosecuting International Crimes in Africa* (Pretoria: Pretoria University Law Press 2011), 163–83; Yacob Haile-Mariam, 'The Quest for Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court', *Hastings International and Comparative Law Review*, *22* (1989–99); J.V. Mayfield, 'The Prosecution of War Crimes and Respect for Human Rights: Ethiopia's Balancing Act', *Emory International Law Review*, *9* (1995), 553–93.

a momentous event in the modern history of Ethiopia. The revolution brought down the three-millennia Solomonic dynasty. Haileselassie I, the last Ethiopian monarch, had been in power for nearly half a century presiding over a semi-feudal economy that relegated the masses to serfdom. His regime's failure to respond to reform demands over the course of his reign led to a spontaneous mass rebellion and eventually a military coup mounted by the Derg.

The rebellion was initiated by university students, peasants, labour unions, urban dwellers and intellectuals. The army also had administrative issues it sought to be addressed. This subsequently led to the formation of a mobilization committee from various sectors of the army composed of junior officers who took charge of the negotiation with the emperor. The negotiations failed to break the deadlock. Following this deadlock, junior officers from various army divisions sent to Addis Ababa to air their grievances took matters into their own hands and removed the aging monarch from power and established the Derg on 28 June 1974.

The Derg declared the abolition of the imperial regime.[5] In a decree that followed two days later, Proclamation No. 2/1967, the members of the Derg, numbering a little over 100, assumed the position of collective heads of states instead of giving power to one single individual. This arrangement changed sometime later when members resolved to empower the Chairman to execute decisions of the general assembly, standing committee and sub-committees.

The assumption and monopolization of power by the military was not acceptable to other organized parties that sought the establishment of a popular government. The ensuing political confrontation ushered in an era of terror that led to the death and injury of tens of thousands of people.[6] At the height of this brazen abuse of power, the Derg empowered its security apparatus, urban and rural dweller associations, militias, and revolutionary guards to kill, torture and maim with impunity anybody suspected of being a 'subversive', 'anti-revolutionary', 'counter-revolutionary', or 'anti people'.[7]

The charges filed by the Special Prosecutor in all Red Terror cases identify 12,315 individuals as being killed. The courts so far have found that 9,546 of these were indeed victims of the crimes perpetrated during that period. Of these, 228 victims were women and girls.[8] Furthermore, 1,500 victims were confirmed by the courts

[5] Provisional Military Government of Ethiopia, Proclamation No. 1/1967.

[6] Human Rights Watch, *Ethiopia: Reckoning Under the Law*, 6:11 (November 1994).

[7] The Red Terror was authorized by Proclamation 121 of 1977: see United States Institute of Peace (1994) *Ethiopia: Report of the Office of the Special Prosecutor*, <http://www.usip.org/files/resources/Ethiopia-SPODossier-2.pdf> (accessed 25 February 2013) (SPO Report).

[8] Report of the SPO on February 2010 to the House of Peoples Representatives. See the video documentary produced by the state run Ethiopian Television in Amharic which includes the SPO Report as well as Member of Parliament comments. See the video on this video-sharing website: <http://www.ethiotube.net/video/8192/Documentary--findings-of-human-rights-abuses-during-Red-Terror-era--Part-1> (Part I) (accessed 25 February 2013) and <http://www.ethiotube.net/video/8194/Documentary--findings-of-human-rights-abuses-during-Red-Terror-era--Part-2> (Part II) (accessed 25 February 2013). For an immediate reaction to the report in transitional justice context see: Luelseged Degu (11 February 2010), 'Report from Special Prosecutor Office of Ethiopia: Half-Way Transitional Justice', *Abugida Ethipian American Information Centre* [website], <http://www.abugidainfo.com/index.php/13562/> (accessed 25 February 2013).

as having suffered bodily injury.[9] The charges also included 2,681 individuals as victims of torture, of which the courts have confirmed 1,687. Of these, 172 were female.[10] These numbers do not necessarily represent the actual number of victims. The number of individuals whose lives were cut short due to the misguided policies of the Derg could run into millions. For example, the forced resettlement programme (1984–6), which consisted of moving hundreds of thousands of peasants from the north of the country to the south, likely for political reasons, caused numerous deaths.[11] The plan, which was officially characterized as a famine relief programme, resettled 600,000 people, of which fifteen to twenty per cent (up to 100,000) lost their lives either in transport or upon arrival.[12] The deaths were largely caused by malnutrition and diseases. There were also war crimes committed against civilians. In one such incident, in June 1988, government forces using MIG-21 jet fighters and attack helicopters systematically attacked the market town of Hawzen in Tigray from dawn to dusk, killing approximately 2,500 civilians.[13]

The Red Terror is only one of the many faces of human rights abuses committed during seventeen years (1974–91) of the Derg's rule. The Red Terror was a campaign of urban counter-insurgency waged in the main cities of Ethiopia between 1976 and 1978 and has been characterized as 'one of the most systematic uses of mass murder by the state ever witnessed in Africa' at the time.[14] The official phase of the Red Terror (a reaction to what was described as the opposition forces' White Terror) began on 17 April 1977 with Mengistu's speech and the symbolic smashing of three bottles in a public square. The three bottles represented the blood of imperialism, feudalism and bureaucratic capitalism.[15] This symbolic act of spilling blood was literally applied, with fervent zeal, in the coming years. The brutality of the campaign is best encapsulated by the following paragraph in a Human Rights Watch report:

> Bodies were left on the roadside to advertise the killings of the previous night—those who inspected the piles of bodies to see if their friends or relatives were among the corpses were targeted for execution or imprisonment themselves. Relatives were forbidden to mourn. In other cases, relatives had to pay one Ethiopian dollar for each 'wasted bullet' in order to have the body returned.[16]

Even children of tender age were not spared the violence. As a Human Rights Watch report confirms (quoting Rene LeFort): 'Simply knowing how to read and write and being aged about 20 or less were enough to define the potential or actual "counter-revolutionary". The authorities were even able to institute a law authorizing the arrest of children between eight and twelve years.'[17]

[9] SPO Report 1994, above n 7.
[10] SPO Report 1994, above n 7.
[11] SPO Report 1994, above n 7.
[12] SPO Report 1994, above n 7.
[13] SPO Report 1994, above n 7.
[14] Africa Watch (September 1991), 'Evil Days: 30 Years of War and Famine in Ethiopia', 101, *Human Rights Watch* [website], <http://www.hrw.org/sites/default/files/reports/Ethiopia919.pdf> (accessed 25 February 2013).
[15] Africa Watch, above n 14, 102.
[16] Africa Watch, above n 14, 103.
[17] Africa Watch, above n 14, 103.

While the state sponsored violence targeted victims far and wide, the use of violence to achieve political objectives was not monopolized by the Derg. There were indeed several assassinations of those allied to the Derg by radical political groups. In fact, the Derg usually blamed radical opposition elements for firing the first shot, forcing it to respond in kind. Numerous defence witnesses at the Mengistu trial testified about the urban warfare and targeted assassinations that were routinely conducted by hit squads of these radical opposition political forces. Unfortunately, the Special Prosecutor's mandate did not extend to the investigation of the conduct of forces other than the Derg during the Red Terror. This has had the effect of undermining the objectivity of the trial. In a sense, the trial tells one side of the story and fails to fairly apportion blame, which is critical to the healing process.

(III) Background to the Trial Program

The Transitional Government of Ethiopia, controlled by Ethiopian People's Revolutionary Democratic Front, an armed group that overthrew the military regime, decided to establish the Office of Special Prosecutor (SPO) in 1992.[18] Mr Girma Wakjira was appointed as Special Prosecutor in September 1992 and given the rank of a minister. The law establishing the SPO claimed that 'heinous and horrendous criminal acts which occupy a special chapter in the history of the peoples of Ethiopia have been perpetrated against the people of Ethiopia by officials, members and auxiliaries of the security and armed forces of the Dergue-WPE regime'.[19] It thus instructed the SPO to investigate and prosecute 'any person having committed or responsible for the commission of an offence by abusing his position in the party, the government or mass organizations under the Dergue-WPE regime'.[20]

The sheer magnitude of the crimes and the multidimensional nature of the conflict throughout the period of the Derg's reign made it impossible for the government to comprehensively document what took place, let alone bring all of the suspects to justice. Ethiopia's choice of prosecution as a transitional justice model means that stories of the sad episode are mainly told through the official channels of court documents and witness testimonies in an adversarial setting. Yet adversarial court proceedings are not necessarily the best mechanisms for getting the true picture of events surrounding the crimes committed.

The trial venues themselves were scattered throughout the country. The principal court with subject matter jurisdiction was the Federal High Court. While the

[18] See note 3 above for the coverage of decision leading to the prosecution of those responsible for the commission of crimes as well as the establishment of the Office of Special Prosecutor.

[19] Proclamation establishing the Office of the Special Prosecutor (8 August 1992), Proclamation No 22/1992, preamble, <http://www.usip.org/files/resources/Ethiopia-Charter.pdf> (accessed 25 February 2013).

[20] Proclamation establishing the Office of the Special Prosecutor (8 August 1992), Proclamation No 22/1992, Article 6, <http://www.usip.org/files/resources/Ethiopia-Charter.pdf> (accessed 25 February 2013).

Federal High Court trials conducted in the capital in Addis Ababa were occasionally reported, the trials in regional supreme courts barely received attention. This reflects the pattern of publicity experienced by Red Terror victims in regional cities, as opposed to the capital.

All these factors indicate that the story of the Ethiopian trials has not been told adequately to domestic audiences, much less to the global community. Unlike other large-scale trials of a similar nature, the Ethiopian trials were a national affair controlled by Ethiopians with minimal input, especially from international and intergovernmental organizations and international civil-society groups. The establishment of the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone were international initiatives and serve as interesting counterpoints. The early engagement of some foreign governments and international non-government organizations (NGOs) did not continue in Ethiopia due to disagreements with the SPO as to the conduct of the trials.[21] In 1994, the SPO decried the lack of support for Ethiopian transitional justice efforts, especially from NGOs, compared to the support given to the El Salvadorean, Chilean, and Argentinian truth and reconciliation commissions. He described his job as being a lonely exercise and expressed frustration at shouldering such a great burden alone.[22]

The trials in the federal courts were conducted in Amharic, the working language at the federal government, and in working languages of regional state governments in regions with delegated local jurisdiction. To the author's knowledge, court and prosecutorial documents are not translated into English or any other foreign language. As a result, key documents remain inaccessible to an audience outside Ethiopia. Even in Ethiopia, scholarly research into the trial is minimal. There were some early efforts to monitor the trials and share the findings with civil societies and international institutions, but that effort did not have a significant impact given the lengthy nature of the trials.[23]

In the legislation establishing the SPO, it was envisioned that the process would establish a historical record of the brutal offences and would educate the people about the need to avoid backsliding into military rule.[24] Unfortunately, this ambition has not been realized because the archives of the trials have not been made publicly available. There is, however, an ongoing initiative by the Ethiopian Red Terror Documentation and Research Centre (ERTDRC) to digitize the documentary evidence used in the trials and make it available to the public and researchers. This is a crucial step, considering the wealth of documentary evidence left behind by the Derg.

The process of collecting incriminating documentary and electronic evidence against the accused for the trials was not as daunting as one would expect for such

[21] Todd Howland, 'Learning to Make Proactive Human Rights Interventions Effective: The Carter Centre and Ethiopia's Office of the Special Prosecutor', *Wisconsin International Law Journal*, *18* (2000), 407–35.

[22] SPO Report 1994, above n 7.

[23] The author took part in the Trial Observation and Monitoring Project involving law students in the observation of the trials held in Addis Ababa.

[24] Proclamation establishing the Office of the Special Prosecutor, above n 19, preamble.

high-profile criminal acts. Bureaucrats meticulously documented the actions taken against most of the victims. When the investigation began, the SPO was able to collect over 25,000 pages of government documents[25] and conduct approximately 5,000 witness interviews.[26] The documents range from death warrants to calculations of the cost of executions to films of torture sessions and bombings.[27]In 1994, a SPO report indicated that it has ten times more evidence than needed to successfully prosecute several of the detainees and many of the exiles for serious criminal offences.[28] Many hope that those documents will be made available for public viewing while the trials are still fresh in the minds of many, but this has yet to come to fruition.

(IV) The Accused

At the beginning of the investigative process, approximately 2,000 former officials were arrested. The overall figure of how many suspects have been arrested throughout the country is still not available.[29] In the case of *Special Prosecutor v Col. Mengistu Hailemariam & others*, seventy-three Derg and 106 non-Derg members were charged. Key accused included Col. Mengistu Hailemariam, Chairman of the Provisional Military Administration Council (PMAC), Chairman of the General Assembly of the PMAC, and Chairman of the PMAC Standing Committee; Major Fikreselassie Wogderes, Secretary for the PMAC General Assembly and its Standing Committee (later Prime Minister); and Captain Fisseha Desta, Secretary for the PMAC and its Standing Committee (later Vice-President). Capitain Fisseha was also a one-time head of the Derg's Administration and Legal Affairs Standing Committee.[30]

(V) The Charges

In 1994, after two years of investigation, the SPO filed its first charges with the Central High Court against seventy-three suspects.[31] Of these, twenty-one were tried *in absentia*, including Mengistu, who had gone into exile in Zimbabwe. The SPO believes that up to 300 government and military officials fled Ethiopia when the Mengistu regime collapsed.[32]

[25] Human Rights Watch, above n 6, 23.
[26] Human Rights Watch, above n 6, 23. See also Donatella Lorch, 'Africa First: Ethiopia War-Crime Trial', *The International Herald Tribune*, 12 November 1994.
[27] Lorch, above n 26.
[28] SPO Report 1994, above n 7.
[29] Human Rights Watch, above n 6.
[30] See the charges, judgments and other materials related to the trials published by the Federal Supreme Court (Addis Ababa: Meskerem 2000).
[31] Mayfield, above n 4, 567.
[32] Mayfield, above n 4, 567.

The accused were charged with 211 counts of genocide, and alternatively 211 counts of homicide in the first degree and other offences against bodily integrity, including 1,823 killings, 999 acts of bodily harm, and 194 enforced disappearances.[33] The accused were classified into three major groups: (1) 146 policy- and decision-makers; (2) 2,433 field commanders who transmitted orders from the first group or initiated their own orders; and (3) 2,619 simple perpetrators.[34]

As noted above, there was sufficient evidence to implicate members of the Derg in the commission of grave international crimes.[35] The first key piece of evidence in this regard concerned the Derg General Assembly's unanimous decision in November 1974 to execute sixty ex-officials of the imperial regime after discussing each ex-official's case and the punishment to be meted out.[36] The minutes of the meeting contain a list of Derg members who were in attendance. The second key piece of evidence is the instruction given by the Derg Campaign Department (under the direct command of a Derg Standing Committee chaired by Mengistu) to Derg special forces to eliminate those preparing to participate in a May Day demonstration in 1976 organized by the Ethiopian People's Revolutionary Party (EPRP).[37] On 30 April 1976, hundreds of youth were executed throughout the country. These and similar executions were given de jure authorization by Proclamation 121 of 1977, which permitted security forces to take action against the so-called counter-revolutionaries.

According to the first charge, the accused, while collectively running the government,[38] publicly encouraged low-level officials, cadres and security personnel to commit crimes in violation of Article 281 and 286 of the 1957 Ethiopian Penal Code. The encouragement allegedly took the form of word of mouth, images, and writings conveyed in public meetings and media announcements. Article 281 deals with the crime of genocide, while Article 286 concerns preparation and provocation to commit crimes of international character, including genocide.

It seems that the Special Prosecutor elected to include the charge of preparation and provocation as a priority because the bulk of the crimes were directly perpetrated by low-level officials who were provoked into committing atrocities by the leaders of the revolution. The low-ranking officials at the various levels of the administrative structure were under the effective control of the Derg, as

[33] Wondwossen L. Kidane, 'The Ethiopian "Red Terror" Trials', in M. Cherif Bassiouni (ed), *Post-Conflict Justice* (Ardsley, NY: Transnational Publishers Inc, 2002), 682.

[34] Howland, above n 21, 407–35, 426, footnote 51. On indictments in general, see Yacob Haile-Mariam, 'The Quest for Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court', *Hastings International and Comparative Law Review*, *22* (1989–1999), 708–12.

[35] SPO Report 1994, above n 7.

[36] SPO Report 1994, above n 7.

[37] SPO Report 1994, above n 7.

[38] The Derg members formed a collective head of state and made all key decisions in the General Assembly, the Standing Committee, and other sub-committees. The SPO charges alleged that the Derg and its sub-committees had been in effective control of government during the relevant periods. According to the SPO charges, official use of force against victims during this period could be attributed to any Derg member unless evidence to the contrary was provided (for example, by proving that a particular Derg member was opposed to the collective decision taken against victims of the regime): SPO Report 1994, above n 7.

the latter body was in charge of recruiting and arming them.[39] The Derg officials also incited low-level officials and security personnel to violence by calling for the elimination of political opponents in public meetings and by transmitting the same message using mass media. Slogans calling for the elimination of anti-people, anti-revolution anarchists, counter-revolutionary reactionaries, the aristocracy, and the bourgeoisie were the most common forms of incitement.[40] It was, in fact, not unusual to come across some of these slogans attached to the corpses of those executed during the Red Terror.[41]

The second charge alleges that the accused as *co-offenders* committed crimes of genocide directly or indirectly in violation of Article 281(a) and (c), as well as Article 32(a) of the 1957 Penal Code. The relevant sections of Article 281(a) and (c) and Article 32(a)[42] are:

Art. 281.—Genocide; Crimes against Humanity.

Whosoever, with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, organises, orders or engaged in, be it in time of war or in time of peace:

(a) Killings, bodily harm or serious injury to the physical or mental health of members of the group, in any way whatsoever; or

. . .

(c) the compulsory movement or dispersion of peoples or children, or their placing under living conditions calculated to result in their death or disappearance, is punishable with rigorous imprisonment from five years to life, or, in cases of exceptional gravity, with death.

Likewise, Article 32 of the Penal Code provides:

Art.32.—Principal Act: Offender and Co-offenders.

(1) A person shall be regarded as having committed an offence and punished as such if:
    (a) he actually commits the offence either directly or indirectly, for example by means of an animal or a natural force; or
    (b) he without performing the criminal act itself fully associates himself with the commission of the offence and the intended result; or
    (c) he employees a mentally deficient person for the commission of an offence or knowingly compels another person to commit an offence.
(2) Where the offence committed goes beyond the intention of the offender he shall he tried in accordance with Article 58 (3).
(3) Where several co-offenders are involved they shall be liable to the same punishment as provided by law.

The Court shall take into account the provisions governing the effect of personal circumstances (Art. 40) and those governing the award of punishment according to the degree of individual guilt. (Art. 86).

The prosecution divided charges in relation to Article 281 into three sub-headings: (1) killing of members of a political group; (2) causing bodily harm

[39] See the charges, above n 30. [40] See the charges, above n 30.

[41] One of these slogans was in Amharic *Qey Shibir Yiffafam*, roughly, 'let Red Terror be intensified'.

[42] Penal Code of Ethiopia 1957, Proclamation No. 158 of 1957, 23 July 1957, available at <http://www.unhcr.org/refworld/docid/49216a0a2.html> (accessed 25 February 2013).

or serious injury to the physical or mental health of members of a political group; and (3) placing members of a political group or victims under living conditions calculated to result in their death or disappearance. In total, 219 counts of genocide were alleged. The prosecution sought to show that these acts occurred between 1974 and 1983. As a matter of prosecutorial strategy, the prosecution also brought an alternative charge of aggravated homicide in violation of Article 522 of the 1957 Penal Code.

The victims identified in the charges could be classified broadly into four groups.[43] The first group included the monarch, members of the royal family, and the aristocracy. In the second group were members of the Derg who died following purges designed to rid the regime of traitors and sympathizers of anti-revolutionary elements. The third group included individuals perceived to be members or sympathizers of the various political parties that stood in opposition to the military regime. In the fourth group were those targeted for elimination for various reasons, such as businessmen who were accused of sabotaging the economy by hoarding and victims of personal vendettas by low-level officials and revolutionary guards.

The political parties in the third group, the Derg's primary targets during the Red Terror, were numerous and differed in their political outlooks. The most prominent parties promoted socialism as their guiding ideology. Members of the EPRP were the most common targets of Derg's brutal crackdown. The EPRP was established in April 1972, two years before the Revolution, as a radical and progressive organization composed of students, intellectuals, workers, and peasants rallying against the feudal system.[44] The EPRP considered the assumption of power by the Derg as the 'usurpation of power and called for the immediate formation of a representative and all inclusive provisional popular government which would pave the way for the formation of an elected popular government'.[45] The outlawing of the EPRP by the Derg did not stop the Party's clandestine political activities and quickly led to armed confrontations both in the cities and rural areas. There is disagreement as to who usually fired the first shot, but EPRP members and those perceived to be its sympathizers overwhelmingly faced the brunt of the violence.[46] MEISON (All-Ethiopian Socialist Movement) originally aligned itself with the government and played a role in the ideological and armed confrontation with EPRP, but later faced the same fate as the EPRP when its leaders fell out with the Derg. MEISON was composed mainly of intellectual returnees from Europe.

Some other parties were organized along ethnic lines and engaged in insurgency in rural areas. The most prominent ones were the Eritrean Liberation Front (ELF), the Eritrean Peoples Liberation Front (EPLF), the Tigrean Peoples Liberation Front (TPLF) and the Oromo Liberation Front (TPLF). The Derg was finally toppled in 1991 by the collective military might of these liberation parties. Strikingly,

[43] See the charges, above n 30.

[44] 'Overview of the History of EPRP', *Ethiopian People's Revolutionary Party* [website], <http://www.eprp.com/party/history.html> (accessed 25 February 2013).

[45] 'Overview of the History of EPRP', above n 44.

[46] Babile Tola, *To Kill a Generation: The Red Terror in Ethiopia* (Washington DC: 2nd edn, Free Ethiopia Press, 1997).

in keeping with the political craze of the time, most if not all of the parties were proponents of Marxist–Leninist ideology.

(VI) Mode of Criminal Responsibility Issues in the Mengistu Trial

The accused advanced wide-ranging objections to the charges filed against them.[47] The objections related to a range of substantive, procedural and institutional aspects of the charges and the trial.[48] The Federal High Court dispensed with these objections in its decision on 10 October 1995. In this section, I will examine objections relating to the mode of criminal responsibility.

The key mode of criminal responsibility provisions in the 1957 Ethiopian Penal Code invoked by the Special Prosecutor against the principal accused were Articles 32(1)(a) and (b), which apply to principal offences committed by offenders and co-offenders. According to Article 32(1)(a), a person shall be regarded as having committed an offence and punished as such if: '[H]e actually commits the offence either *directly or indirectly*, for example by means of an animal or a natural force; or (b) he without performing the criminal act itself *fully associates* himself with the commission of the offence and the intended result' (emphasis added). This makes the direct and indirect participation in the commission of crimes the most important mode of criminal responsibility.

[47] *Special Prosecutor v Col. Mengistu Hailemariam & Others*, Ruling on Preliminary Objections, 10 October 1996, File No. 1/87, Ethiopian Federal High Court.

[48] The objections were: (1) The courts established by the transitional charter have no jurisdiction to try accused charged for commission of the crime of genocide; (2) Bringing the accused before courts is not the transitional government's regular duty or responsibility; (3) The actions of the provisional military administration as government could not be retrospectively judged as illegal; (4) The 1955 Revised Constitution which was the basis for the adoption of the 1957 Penal Code in its Article 4 as well as Article 2137 of the Civil Code provide immunity from prosecution or civil liability for the Head of State; (5) The cases should not be tried in domestic courts; (6) It is inappropriate for Article 281 of the 1957 Penal Code to include 'political groups' in groups protected against genocide; (7) The case of the defendants has not been referred for preliminary inquiry according to Article 80 of the Ethiopian Criminal Procedure Code which requires preliminary inquiry for grave charges such as aggravated homicide; (8) The charge was not brought within fifteen days after the completion of the investigation file as required by Article 109 of the Ethiopian Criminal Procedure Code; (9) This case is not suitable for judicial settlement. The best solution is to seek national reconciliation; (10) The charges are barred by statute of limitation as per Articles 286, 414 and 416 of the 1957 Ethiopian Penal Code; (11) The charge of committing fraud in a name of courts lacks specificity; (12) The inclusion of names of individuals who are no longer alive as co-offenders is prejudicial to their case; (13) Accused other than the top twelve request a separate trial as they are only accused with the top twelve on eighteen counts out of over 200 counts; (14) The charges against the accused are not specific enough or the time and place of commission are unknown, weapons used and the level of participation of each accused in the alleged crimes are not sufficiently specified. This creates suspicion as to whether the alleged crimes were committed; (15) The charges are confusing; (16) The crime of provocation to commit genocide under Article 286 and the crime of commission of genocide cannot be charged cumulatively; (17) It is improper to cite Articles 32(1)(a) and (c) against one accused in respect of one charge; (18) Objection regarding the mention of Article 37(1) of the Penal Code on criminal conspiracy as the provisional military administration council was not created to commit crimes but to lead the country. Furthermore, it is improper to charge them both as co-offenders and co-conspirators at the same time.

As pointed out, the core group of the accused was comprised of members of the Derg. When the Derg collapsed in 1991, seventy-three original members faced prosecution.[49] The prosecutor alleged that these members committed crimes in their capacity as members of the Derg General Assembly and as members of committees and sub-committees that were responsible for executive decisions.[50] According to the prosecutor, these leaders exercised effective control over the police, security and paramilitary forces who directly committed crimes.[51]

One of the many objections of the accused related to their individual criminal responsibility in light of their subordinate position to Chairman of the Derg, with whom ultimate power resided. The accused claimed that they could not be held responsible unless they acted *ultra vires*, because Proclamation No. 110/69, Article 8, gave the Chairman of the Derg sole responsibility of protecting peace and security, maintaining unity of the country and taking action against anti-people and anti-revolution forces.[52] The Federal High Court dismissed their objections, stating that this provision did not mean that the Chairman carried out these responsibilities on his own.[53] Obviously, even if the Chairman exercised ultimate de jure power, there appears to be no question about the division of labour between members of the Derg's standing and sub-committees. De jure command may be ascertained on the basis of pre-established official hierarchies, whether in a civilian or a military power structure.[54] ICTY and ICTR jurisprudence identifies three general criteria to determine evidence of de facto command for civil and military authorities when de jure power is lacking.[55] These are: (i) the power to influence; (ii) capacity to issue orders; and (iii) evidence stemming from the distribution of tasks.[56] Thus, the prosecution could have established both the de jure and the de facto power exercised by Derg members. However, neither the prosecution nor the Court took the opportunity and invoked established jurisprudence of international criminal tribunals to demonstrate the de jure and de facto power exercised by Derg members. As a result, they missed the opportunity to solidify the conceptual legal basis on which the defendants were convicted.

The accused also objected to the mode of responsibility by attempting to refute the existence of an overall plan to eliminate political opponents. In its merits decision of 12 December 2006, the Federal High Court held that the accused had taken part in the implementation of the common plan conceived by the Derg.[57] It noted that the Derg passed a standing military order between *Sene* 30/1966 and *Tikimit* 06/1967 to eliminate individuals and groups opposed to the revolution. According to the Court, the Derg's announcement following the assassination of prominent figures and members of the former imperial regime (indicating that killing of such people did not amount to a killing of innocents) demonstrated

[49] See charges, above n 30. [50] See charges, above n 30. [51] See charges, above n 30.

[52] *Special Prosecutor v Col. Mengistu Hailemariam & Others,* Ruling on Preliminary Objections, 10 October 1996, File No. 1/87, Ethiopian Federal High Court, 22.

[53] *Special Prosecutor v Mengistu*, above n 52.

[54] Ilias Bantekas, 'De Facto Command' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press 2009), 291.

[55] Bantekas, above n 54, 292. [56] Bantekas, above n 54. [57] Bantekas, above n 54, 4–5.

that there was a plan to destroy people politically associated with the overthrown regime.[58]

The Court further noted that the decision made by the Derg in a meeting held on *Hidar* 10/1969, which permitted every power structure in the Derg to take action against anti-revolution elements, supported the idea that there had been a decision to eliminate political opponents. According to the Court, various actions taken after this decision, such as summary executions, torture and imprisonment, confirmed the Derg's plan to eliminate individuals associated with the imperial regime and those opposed to the revolution.

The Court additionally held that the willingness of the accused to continue as Derg members after the commission of the crimes demonstrated their continued determination to stand by the Derg's decision to eliminate political opponents.[59] According to the Court, because the Derg could not carry out its functions without its members, its decisions were its members' decisions, as well.[60] Its members owned the Derg's actions by directly supporting—or by at least not opposing—them, so by continuing as members they thereby helped the group continue to exist.[61]

It is important to examine analogous international criminal law rules and jurisprudence to make sense of the allegations and defences mounted by the accused in relation to modes of criminal responsibility. In its *Lubanga* confirmation of charges decision, the Pre-Trial Chamber highlighted the importance of control in the notion of co-perpetration. According to this notion:

> The principals of a crime are not limited to those who physically carry out the objective elements of the offence, but also include those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed.[62]

Thus, according to the Pre-Trial Chamber, the concept of co-perpetration embodied in Article 25(3)(a) of the Rome Statute coincides with joint control over the crime by reason of the essential nature of the various contributions to the commission of the crime.[63] According to the Chamber, the concept of co-perpetration based on joint control over the crime is rooted:

> [I]n the principle of the division of essential tasks for the purpose of committing a crime between two or more persons acting in a concerted manner. Hence, although none of the participants has overall control over the offence because they all depend on one another for its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her task.[64]

The Ethiopian courts had the opportunity to elaborate the concept of co-perpetration in the *Mengistu* case. Unfortunately, both the Federal High Court

58 Bantekas, above n 54.
59 Bantekas, above n 54.
60 Bantekas, above n 54.
61 Bantekas, above n 54.
62 International Criminal Court, *Prosecutor v Thomas Lubanga Dylo*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, [330].
63 *Lubanga*, above n 62, [341].
64 *Lubanga*, above n 62, [342].

and Supreme Court failed to create a well-defined theory of individual criminal responsibility of co-offenders.

One of the key objective elements of the concept of co-perpetration is the existence of an agreement or common plan between two or more persons.[65] Although the common plan must include an element of criminality, it does not need to specifically be directed at the commission of a crime.[66] It suffices:

i. That the co-perpetrators have agreed (a) to start the implementation of the common plan to achieve a non-criminal goals, and (b) to only commit the crime if certain conditions are met; or
ii. That the co-perpetrators (a) are aware of the risk that implementing the common plan (which is specifically directed at the achievement of a non-criminal goals) will result in the commission of the crime, and (b) accept such an outcome.

While one can question whether this objective element of the concept of co-perpetration reflects a rule of customary international law, one can hardly ignore the relevance of the concept for the defence's argument and the Court's decision on issues of individual criminal responsibility for genocide in the *Mengistu* case. For instance, one of the defence's arguments was that the Derg had no plan to commit genocide, a contention that goes to the heart of one of the objective requirements of the co-perpetration. The Court responded:

> [A]s it is clearly known, when a government is in power, it does not have only one objective or tasks. It has many objectives and tasks. The evidence submitted by the parties demonstrates this. However, even if many of its objectives were good, the existence of good deeds do not wipe out responsibility for the criminal acts. One cannot say that there was no criminal intention. The main question is whether the accused had the intention to eliminate politically affiliated groups.[67]

This seems to be in line with the Pre-Trial Chamber's decision in the *Lubanga* case, which held that co-perpetrators may well initially set out to implement non-criminal goals and only later agree to commit crimes. The Derg members did not form the Provisional Military Administration Council to commit crimes, but they agreed to eliminate their political opponents after the latter demanded the establishment of a popularly-elected government.

The accused presented a large number of defence witnesses who testified that the Derg had no plan for eliminating their political adversaries. The bulk of their testimony was misdirected, however, toward disproving the existence of a pre-conceived plan to eliminate political opponents. As the Pre-Trial Chamber observed in *Lubanga*, 'the agreement need not be explicit and that its existence can be inferred from subsequent concerted action of the co-perpetrators'.[68]

The second most important objective requirement of co-perpetration based on joint control over the crime is 'the co-ordinated essential contribution made by

[65] *Lubanga*, above n 62, [343]. [66] *Lubanga*, above n 62, [344].
[67] *Lubanga*, above n 62. [68] *Lubanga*, above n 62, [345].

each co-perpetrator resulting in the realization of the objective elements of the crime'.[69] The essential contribution is conditioned on the member's power to frustrate the commission of the crime by not performing his or her tasks.[70] Key Derg members assumed various leadership roles. In addition to being members of the Derg's General Assembly, which was its highest organ and collectively served as head of state, they also served as members and chairs of different key standing committees and sub-committees that enjoyed tremendous power in implementing General Assembly decisions. It is was thus imperative that the actions of each accused be explained in light of the control requirement and their ability to frustrate the commission of the Derg's crimes. Unfortunately, the prosecution's charges as well as the trial and appeal courts' decisions fall far short of providing a clear picture about each individual's contribution to the common plan.

The Ethiopian Penal Code does not include planning as a mode of responsibility. But the notion of planning feeds into the notion of common plan by co-offenders. In ICTY and ICTR jurisprudence, the *actus reus* of planning requires that one or more persons design criminal conduct that results in the perpetration of one or more statutory crimes.[71] It is 'sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct'; but-for causation is not required[72] The *mens rea* of planning requires that 'the accused, directly or indirectly, intended the crime in question to be committed'.[73] In *Kordić and Čerkez,* it was held that the required intent exists when 'a person (who) plans an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that plan... Planning with such awareness has to be regarded as accepting that crime'.[74] The crimes allegedly committed by Derg members could easily qualify as planning under this framework. Indeed, that framework would have been particularly useful in the case of Derg members who did not sign execution orders or oversaw the liquidation of political opponents. Unfortunately, both the prosecution and the courts again missed the opportunity to use the ICTY and ICTR's jurisprudence to find the defendants guilty in a manner that would withstand the test of international scrutiny.

Issues of modes of criminal responsibility are also apparent when one looks closely at the defences mounted by individual accused. For instance, two of the accused, Fikreselassie Wogderes (former Prime Minister) and Fissheha Desta (former Vice-President) were able to prove that they were outside the country when some of the specified criminal acts were committed, including the execution of the Emperor as well as the purge and murder of other Derg members. The Court nevertheless held that:

[69] *Lubanga*, above n 62, [346]. [70] *Lubanga*, above n 62, [347].

[71] *Lubanga*, above n 62. See also, International Tribunal for the Former Yugoslavia, *Prosecutor v Blaškić,* Trial Chamber, Judgment, 3 March 2000, [279]; International Tribunal for the Former Yugoslavia, *Prosecutor v Kristić*, Trial Chamber, Judgment, 2 August 2001, [601].

[72] International Tribunal for the Former Yugoslavia, *Prosecutor v Kordić and Čerkez,* Appeals Chamber, Judgment, 17 December 2004, [26].

[73] *Blaškić,* above n 71, [278]; International Tribunal for the Former Yugoslavia, *Prosecutor v Kordić and Čerkez,* Trial Chamber, Judgment, 26 February 2001, [386].

[74] See Stefano Manacorda, 'Planning' in Cassese, above n 54, 456.

> [S]uch defences are only relevant for a person who is accused of directly and personally committing crimes. The accused in this file were not charged for committing all the crimes. They were accused of causing the crimes to be committed and it is clear that others committed the said crimes. Therefore, it is not necessary for the accused to be physically present and supervise or assist in the commission. . . . The Prosecution's evidence demonstrated that the crimes were committed by the Derg with the intention and plan of its members and by its institutions. Therefore, the accused could commit the crimes from anywhere.[75]

The Secretary of the Derg argued that he did not make the decisions to take action against the victims, but merely conveyed, in his capacity as Secretary, the decisions made orally by the Chairman. The Court, however, held that the signatures on the execution and arrest orders showed that he permitted the actions to be taken and there was no indication that he gave the orders in pursuance of the oral decision made by someone else.[76] Besides, even if it could be concluded that the Secretary was merely conveying the Chairman's decision, his signature indicated that he had agreed with the decisions.[77] The Court further held that since decisions or guidelines were made by the General Assembly, of which the accused was a member, he was liable in his role as a participant in the Assembly. The accused carried out his responsibility based on the division of labour between the members of the Derg.

In another instance, an accused was able to prove that he had objected to arbitrary killings at the height of the Red Terror. However, the Court held that this isolated act of objecting to mistreatment of political opponents could not absolve him of liability, because the accused was not opposed to the overall plan of eliminating political adversaries.[78]

Continued membership in the Derg was also considered critical for the conviction of a Derg member who was initially involved in the day-to-day operation of different ministries but was later imprisoned by the Derg for fifteen years. He was nevertheless held responsible for the regime's decisions.[79] In contrast, the forty-first defendant—Corporal Begashaw Gurmesa—was acquitted because he was able to show his opposition to the Derg's criminal intentions even before he fell out of favour.[80] Throughout, the Federal High Court reiterated that the specific responsibilities of a Derg member did not matter; instead, it was sufficient if he/she was a member of the Derg, did not oppose its decisions, and associated himself with its actions.[81]

The Special Prosecutor appealed the sentencing decision of twenty-one convictees, while another twenty-three cross-appealed. In their appeals, the accused submitted, *inter alia*, that:

1. They did not commit the crimes and that none of the prosecution's witnesses directly and individually implicated them;

[75] Federal High Court, Judgment on Merits: See the judgment and other materials related to the trials published by the Federal Supreme Court, above n 30, 135.

[76] Judgment on Merits, above n 75, 136.

[77] Judgment on Merits, above n 75.

[78] Judgment on Merits, above n 75, 319.

[79] Judgment on Merits, above n 75, 385.

[80] Judgment on Merits, above n 75, 412.

[81] Judgment on Merits, above n 75, 419.

2. their names were not found on the documentary evidence introduced by the SPO and most of the documentary evidence consisted of photocopies, to which the law did not attach great evidentiary value;
3. [t]he Federal High Court found them guilty not because there was specific evidence against them, but merely because they were members of the Derg.

Again, these points of appeal mostly raise issues concerning modes of criminal responsibility.

With regard to its appeal, the prosecution submitted:

> The accused are members of the Derg. The Derg is represented by its members and it cannot exist without its members and the decision of the Derg means the decision of its members. The accused remained members of the Derg until the very end and are responsible for crimes committed by the Derg. The accused, as members of the Derg, had planned to eliminate groups organised on political basis. Following their decision to execute members of the former imperial regime, they came up with a general policy of eliminating those opposed to the Revolution and the Derg. They accepted as their own the consequences of the acts committed as per the plan hatched by the Derg. There is no reason why they should not be responsible for the consequences of their policies.[82]

The Federal Supreme Court affirmed the Federal High Court's findings in regards to the conviction of those charged in the *Mengistu* case.[83] It held that a decision of the Derg was not the decision of one member or of the few; instead it was a decision of the members as a whole.[84] Moreover, it concluded that the members must have accepted the consequences of the Derg's decisions.[85] Continued membership in the Derg led to their liability regardless of their being dispatched to provinces away from where major decisions were made.[86]

What is most striking here is the Court's attribution of later criminal acts to the entire membership of the Derg by virtue of the Derg's earlier collective decision to target persons whose political outlook was similar to the sixty members of the imperial regime who received the first blow and those who were generally categorized as counter-revolutionaries.[87] Another decision taken during the Derg's early rule, which permitted all members to take action against anti-revolutionary elements, was also used by the Court to hold that the actions of the whole could be attributed to the few.

As shown above, both the Federal High and Supreme Courts concluded that the accused's criminal responsibility could be based on their membership of the Derg. This is a tenuous basis for determining individual criminal responsibility, given that the Derg was not pronounced a criminal organization. While its machinery was no doubt responsible for the many atrocities committed, it is incumbent upon courts to establish a carefully constructed theory of individual criminal responsibility so as not to condemn all Derg members merely by association.

[82] *Mengitsu*, above n 1. [83] *Mengitsu*, above n 1, 23–25. [84] *Mengitsu*, above n 1, 21.
[85] *Mengitsu*, above n 1. [86] *Mengitsu*, above n 1.
[87] At a meeting held on 10 *Hidar* 1969 it was decided that every member of the Derg was empowered to take action against anti-revolution elements.

(VII) Concluding Remarks

This chapter examined the mode of criminal responsibility adopted in the Ethiopian courts' decisions in the case of former Derg members accused of committing genocide against their political opponents. The Ethiopian Penal Code contains a concept of co-perpetration as a mode of criminal responsibility that is particularly well-suited to the prosecution of suspects who plan and direct the commission of mass crimes without direct physical perpetration. Although analogous modes of criminal responsibility have been adopted by the ICTY and ICTR, the Ethiopian concept of co-perpetration is most similar to Article 25(3)(a) of the Rome Statute, where reference is made to notions such as 'co-perpetration'. That similarity is perhaps due to the continental law pedigrees of the Rome Statute and the 1957 Ethiopian Penal Code.

Ethiopia's mass prosecution of mass crimes committed during the military regime nevertheless raises serious questions about individual criminal responsibility. Although it is possible for a large group of individuals to commit heinous crimes in concert, it is rarely easy to prosecute all of them at once unless all of the suspects contributed equally to the criminal scheme. That is why it is important for the prosecution and courts to have a clear theory of individual criminal responsibility in apportioning guilt. The joint trial of well over one hundred individuals is unprecedented in recent history. Although the idea of a joint trial is not a problem in and of itself, assuming that the parties shared criminal intention and carried out certain prohibited acts in furtherance of those intentions, the idea of individual guilt remains fundamental. For justice to be properly served, individual criminal responsibility must clearly be shown to exist. Loose notions such as membership in an organization or non-opposition to criminal actions should not be taken as absolute indicators of culpability. Membership in organization does not necessarily mean that all members enjoy the same power or can frustrate the criminal plan. Nor does non-opposition to a criminal plan mean the non-opposing member took part in the criminal act. Overall, as shown in this chapter, the Ethiopian courts missed an opportunity to benefit from the decisions of international tribunals concerning modes of criminal responsibility. Not only did this affect the quality of the judgements in the Mengistu trial, it also failed to decisively dispel the view that some members of the Derg were found guilty by association. A well-conceived and executed theory of mode of criminal responsibility could have assisted in this regard. Regardless, the Ethiopian trial has at least managed to document the story of victims of the Red Terror, a story which unfortunately remains inaccessible to the wider public and international community. The vast trove of documentary and electronic evidence in the prosecutor's custody is yet to be digitized and publically distributed twenty years after the commencement of the trials. The language barrier also means that only those with working knowledge of Amharic language are able to do meaningful research into the trial documents. As a result, there has been little research on the trials. The Ethiopian trial is also notable for its inability

to attract and continuously engage foreign donors who could have financially and technically supported the endeavour.

The trial also failed to give a balanced picture of the conflict as the prosecution was empowered only to investigate and prosecute crimes committed by those in government. Hence the pedagogical value of the trials is somewhat diminished as a result of this selectivity.

PART 6

SOUTHERN HISTORIES

16

War Crimes Trials, 'Victor's Justice' and Australian Military Justice in the Aftermath of the Second World War

*Georgina Fitzpatrick**

> [The convicted] are called war criminals, but they are not criminals at all. They are all innocent. They committed no crime. You need not feel ashamed. People in other parts of the world, too, are beginning to understand that war crimes trials were mistaken.
>
> Judge Radhabinod Pal to families of convicted 'B' and 'C' class war criminals, Fukuoka, 1952[1]

Between 1945 and 1951, the Australian military services conducted 300 war crimes trials at Darwin and several island locations in the Asia-Pacific region.[2] There were 952 Japanese tried, several appearing in more than one trial. The military courts, set up under the War Crimes Act 1945, were presided over by three to five military men, none of them required to have any legal training.[3] A Judge-Advocate could be appointed to assist with legal advice but this was not mandatory.[4] The prosecuting officer tended to have been a solicitor or a barrister in civilian life subsequently recruited into the Australian Army Legal Corps (AALC). The defending officer, although sometimes from the AALC, could be Japanese, accustomed to a

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[1] Quoted in Yuma Totani, *The Tokyo War Crimes Trials: The Pursuit of Justice in the Wake of World War II* (Cambridge, MA and London: Harvard University Press, 2008), 226. 'B' class war criminals were those accused of conventional war crimes, 'C' class were accused of crimes against humanity. In practice, 'B' and 'C' category crimes overlapped so that these 'minor' trials are referred to collectively. 'A' class were those tried at the International Military Tribunal of the Far East (IMTFE) for crimes against peace.

[2] Trials were held at Morotai, Labuan, Wewak, Rabaul, Darwin, Singapore, Hong Kong and Manus. One trial began at Ambon but it was completed at Morotai.

[3] The British military courts required at least one of their court members to have legal qualifications: Philip R Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945–1951* (Austin, TX: University of Texas Press, 1979), 98.

[4] In this respect, the Australian practice also differed from the British, Michael Carrel, *Australia's Prosecution of Japanese War Criminals: Stimuli and Constraints*, PhD Thesis, (The University of Melbourne, 2005), 83.

completely different legal system and operating through interpreters. The accused, even if they knew some English, faced trial, perhaps for their life, reliant on such interpreters as the Australian military courts could provide. Sometimes the trials rattled through at a great pace, with the only evidence sworn statements by witnesses who were not present to be tested by cross examination. On the face of it, there could be grounds for unease.

(I) The Impact of Judge Pal

Ever since the 1952 publication of Judge Pal's dissenting position at the International Military Tribunal of the Far East (IMTFE), there has been an undercurrent of criticism about the charges and the procedures at the trials of the major Japanese war criminals in Tokyo. On the sixtieth anniversary of the judgment at Tokyo, a gathering of historians and international lawyers revisited the question of 'victor's justice' and demonstrated its continuing interest.[5] In Japan, Pal's critique has shaped the discussion for several generations, as Dr Totani has set out so clearly in her beautifully argued book on the IMTFE.[6] Pal's critique also had its effect on historians of other nationalities. Richard Minear nailed his colours to the mast with his title, *Victor's Justice*, published in 1971, which became very influential in Anglophone circles.[7] Thirty years later, a Taiwanese historian, Leo T.S. Ching, could still refer to the IMTFE as 'a theatrical demonstration of the losers' criminality and a farcical assertion of the victors' moral righteousness'.[8] This has been a viewpoint of some longevity which Dr Totani's challenging book, with its close attention to the actual trial transcript and appended evidence, may find difficult to dislodge. The debate about the IMTFE lies outside the scope of this chapter but it provides one context in which any discussion of fairness in relation to the trials of the so-called minor criminals must be placed. Too many historians have leapt to the conclusion that 'victor's justice' is an appropriate term to apply to the minor trials and yet the research has barely begun.

Judge Pal also played a part in framing the discourse about the minor trials. During his first post-Tribunal trip to Japan in 1952, as quoted at the beginning of this chapter, he assured the families of convicted 'B' and 'C' class war criminals that their relatives had 'committed no crime'.[9] He reiterated this view when he saw those serving their time in Sugamo prison alongside the 'A' class war criminals, declaring: 'None of you bore any guilt'. On the one hand, Pal argued that

[5] The papers from the November 2008 conference at Melbourne Law School have been published. See Yuki Tanaka, Tim McCormack and Gerry Simpson (eds), *Beyond Victor's Justice? The Tokyo War Crimes Trials Revisited* (Boston, MA and Leiden: Brill Academic Publishers, 2011).

[6] Totani, above n 1, 224–45.

[7] Richard Minear, *Victors' Justice: The Tokyo War Crimes Trials* (Princeton, NJ: Princeton University Press, 1971). This was reprinted in 2001.

[8] Leo T.S. Ching, *Becoming 'Japanese': Colonial Taiwan and the Politics of Identity Formation* (Berkeley, CA: University of California Press, 2001), 46.

[9] Totani, above n 1, 226.

the major war criminals could not be held responsible for what had happened in far-flung islands because those crimes should be laid at the feet of the perpetrators in the field (his IMTFE position), and on the other hand, he argued, without perceiving any inconsistency or lack of logic, that the latter should be exonerated as well.[10]

Pal's assertion that those convicted at the minor trials were 'all innocent' suggests some hubris. It is most unlikely that he had access to, much less worked through, the transcripts of the 2,240 or so minor trials conducted by several Allied countries between 1945 and 1951.[11] Even sixty years after the last one finished—an Australian-run trial held on Manus Island in April 1951—insufficient research has been undertaken to make such blanket declarations with confidence. Until a complete series of trials conducted by one country is explored, such assumptions cannot be tested.[12] As the historian currently engaged in an extensive study of Australia's 300 war crimes trials,[13] it is my intention here to challenge the imputation of wholesale injustice visited upon the 'B' and 'C' class minor war criminals and to make some preliminary observations.

(II) The Australian Trials

Little has been written, much less published, about the Australian-run trials. There are chapters in books,[14] a few articles,[15] and two doctoral theses.[16] David Sissons, the acknowledged expert and participant—as an interpreter at three Morotai trials in February 1946—worked intensively through the Australian and Japanese sources

[10] Totani, above n 1, 227.

[11] Trials of Japanese 'B' and 'C' class suspects were held by America, Britain, Australia, Netherlands, France, Philippines and China. See the comparative statistics in Piccigallo, above n 3, 264. These should be treated with caution as ongoing research updates or clarifies some figures.

[12] For the British trials, see Hirofumi Hayashi, 'British War Crimes Trials of Japanese,' *Nature-People-Society: Science and the Humanities*, *31* (2001); R. John Pritchard, 'The Gift of Clemency following British War Crimes Trials in the Far East, 1946–1948', *Criminal Law Forum*, *7* (1996), 15.

[13] Under the leadership of Professor Tim McCormack, Asia Pacific Centre for Military Law, Melbourne Law School, the study is entitled *Australia's Post-World War Crimes Trials: A Systematic and Comprehensive Law Reports Series* consisting of 300 Law Reports (prepared by Dr Narrelle Morris) and eight historical essays by this author providing context for each location of the Australian trials. It is anticipated that publication will begin 2015.

[14] Michael Carrel, 'Australia's Prosecution of Japanese War Criminals: Stimuli and Constraints' in David A Blumenthal and Timothy L.H. McCormack (eds), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?* (Boston, MA and Leiden: Martinus Nijhoff Publishers, 2008), 239; Gavan McCormack, 'Apportioning the Blame: Australian Trials for Railway Crimes' in Gavan McCormack and Hank Nelson (eds), *Burma/Thailand Railway: Memory and History* (Crows Nest, NSW: Allen & Unwin, 1993), 85.

[15] David Creed, Moira Rayner and Sue Rickard, 'It Will Not be Bound by the Ordinary Rules of Evidence,' *Journal of the Australian War Memorial*, *27* (1995), 47; Rob Gill, 'The Aftermath of War (Japanese soldiers on trial in Darwin),' *Northern Perspective*, *18* (1995), 98; Emmi Okada, 'The Australian Trials of Class B and C Japanese War Crimes Suspects, 1945–51', *Australian International Law Journal*, (2009), 47.

[16] Caroline Pappas, *Law and Politics: Australia's War Crimes Trials in the Pacific, 1943–1961*, PhD thesis (University of New South Wales, 1998); Carrel, above n 4.

from the mid-70s to the mid-90s. However, he only published a brief entry in various editions of the *Australian Encyclopaedia*,[17] an article giving a guide to sources[18] and a long essay published posthumously online in 2006.[19] Before his death in 2006, he deposited his papers with the National Library of Australia. These have been of great benefit for my research, because he interviewed or corresponded with many of his fellow participants, now deceased. He also hunted down and translated many of the Japanese accounts.[20] To his assiduity, I owe a great debt.

An article of some influence in this poorly served field of scholarship has referred to the Australian trials as 'an unfortunate episode' and, on the basis of two cases tried at Rabaul, has portrayed the general spirit of Australia at the time of the trials as a 'time of revenge and retribution for perceived Japanese mistreatment of allied prisoners of war and of civilians occupied by Japan'. Leaving aside the tendentious use of the word 'perceived' and the weighted choice of quotation in the title—'It Will Not be Bound by the Ordinary Rules of Evidence'—to suggest summary justice, Creed and his fellow authors[21] discussed two trials in which four Japanese soldiers were accused of sexual crimes against Chinese women, for which they received the death sentence.[22] Written during the preparations for the 1995 Australia Remembers commemorations, the authors called for retrospective compassion for the four men hanged 'for offences for which Australian soldiers could not or would not, have been executed'.[23] While the harshness of the sentences is indeed remarkable for crimes when the victims did not die, the argument of Creed et al needs some unpacking.

The authors set out the steps of the two trials fairly accurately. My concerns stem from the manner in which the argument is built up in order to arrive at their verdict that these cases appear 'to have been a substantial miscarriage of justice'.[24] In the first trial, a case of rape, we are told that not only are the names of the prosecuting and defending officers not known—they were not recorded in the trial transcripts—but that we do not know 'whether the defending officer was assisted by a Japanese counsel'.[25] To the reader, it would seem that the accused, Sergeant

[17] David Sissons, 'War Crimes Trials', in *Australian Encyclopaedia* (Sydney, NSW: Australian Geographic, 5th edn, 1988), 2980. This edition is to be preferred to later editions which removed his criticisms of the trials.

[18] David Sissons (1997), 'Sources on Australian Investigations into Japanese War Crimes in the Pacific,' *Journal of the Australian War Memorial* [online], <http://www.awm.gov.au/journal/j30/sissons.asp> (accessed 24 February 2013).

[19] David Sissons (2006), *The Australian War Crimes Trials and Investigations (1942–51)*, <http://socrates.berkeley.edu/~warcrimes/documents/PT.htm> (accessed 24 February 2013).

[20] See the finding aid to his papers, held at the National Library of Australia (NLA) <http://nla.gov.au/nla.ms-ms3092> (accessed 24 February 2013).

[21] Creed, above n 15, 47. The quotation came from a speech by the Minister for Defence, John Beasley, when explaining the provisions of the War Crimes Act, Commonwealth, *Parliamentary Debates*, House of Representatives, 4 October 1945, 6511.

[22] The cases were held on 12–13 December 1945 and 6 April 1946. All the Australian-run trials are digitized and may be found through the online catalogue of the National Archives of Australia. For the trial transcripts see Trial of Sergeant Yaki Yoshio, National Archives of Australia (NAA) Canberra, A471, 80747 and Trial of Warrant Officer Matsumoto Tsugiji and two others, A471, 80782 respectively.

[23] Creed, above n 15, 47, 53. [24] Creed, above n 15, 53. [25] Creed, above n 15, 47.

Yaki Yoshio, was very likely at a disadvantage. These deficiencies in information, however, could have been remedied by reading the press reports which not only name the Australian legal personnel but also name Captain Sekiyama as a Japanese lawyer from Tokyo assisting the defence.[26] So Sergeant Yaki was not disadvantaged in this sense. He had an Australian and a Japanese lawyer defending him.

In discussing this case the authors found it an 'unusual feature' and 'astounding' that the accused did not petition against either the finding or the sentence.[27] First of all, the decision not to petition was not unique.[28] Secondly, although the trial record does not indicate why the accused did not petition, there is some evidence elsewhere as to the reason. The accused had admitted having sexual intercourse with the Chinese woman. The dispute in court between victim and accused rested on the question of consent. It seems that General Imamura, General Officer Commanding of the 8th Japanese Army in the Islands, agreed with the verdict of the court that there had been no consent. Imamura regarded rape as such a heinous crime that he forbade Sergeant Yaki the right to petition.[29] A very junior Japanese soldier would not disobey such an order. Thus, Yaki's decision not to petition, even if 'astounding', is a consequence of a Japanese cultural mindset in which obedience to superiors overrides self-interest. It cannot be ascribed to some impediment in the Australian procedure.

Another possibly misleading statement about this case concerns Lieutenant General Vernon Sturdee, the Confirming Authority, who, it is alleged, established 'an almost universal practice for Australian war crimes trials simply confirming the findings and sentence without giving reasons'.[30] While it is true that Sturdee did not provide explanations for his confirmations—although at earlier stages of the reviewing process, reasons were quite often given by reviewing officers for their recommendations—the impression is given to the reader that confirmations were automatic and that Sturdee acted without volition. In fact, Sturdee commuted so many death sentences in the first few months of the trials that there was a public outcry.[31]

In the second case discussed by the authors, the main concern expressed is that the three men convicted received a death sentence for the crime of torture 'an even more unusual departure from contemporary Australian legal procedure'. It is outside the scope of this chapter and my expertise as a historian to consider whether the argument that military courts did not follow domestic precedents is a useful one to pursue.[32] However, their account of the torture enacted upon the Chinese victim and confirmed by local witnesses omits the information that the assaults

[26] 'War Trials at Rabaul', *Sydney Morning Herald* (Sydney), 13 December 1945, 3.
[27] Creed, above n 15, 47, 49–50.
[28] For example, after a trial held at Wewak two weeks earlier, a Japanese lieutenant sentenced to death for cannibalism had also chosen not to petition. See below n 95.
[29] One of the Japanese defence counsel at Rabaul noted this in a privately published Japanese book on *Rabauru* (Rabaul) cited in Sissons, above n 19.
[30] Creed, above n 15, 47, 49.
[31] See discussion below n 107.
[32] Torture was defined as a war crime and the death sentence was among the punishments permitted under the War Crimes Act 1945 (Cth).

on two successive days involved a banana. What happened was more than torture even if rape was not specified as one of the charges. In conducting this trial, the court members and legal personnel showed great, and perhaps unexpected, sensitivity to the victim, closing the court to the public to save her from embarrassment before her neighbours. As a contemporary press account reported, the crimes were 'so revolting that no newspaper could print them'.[33]

One aspect that the authors of this article highlight is the speed with which the accused were sentenced—that the court members took only five minutes to consider their verdict and a further five[34] to announce the verdict and hear any submissions on sentencing. Once more summary justice is implied. However, one could look at it another way. The President of the Court, Lieutenant Colonel John Moyes (Headquarters 8th Military District (8MD)), and one of the three court members, Major J. W. Ogle, had amassed considerable experience from other trials.[35] It seems likely that they understood the circumstances existing during the occupation of New Britain, the situation of the Japanese garrison and the position of the local Chinese and had developed an informal scale of atrocities.

The final point to be discussed here in relation to this case is the assertion that the 'confirmation procedures in the torture case were also brief'.[36] The implication is that the three Japanese on trial were particularly badly treated in the reviewing process. They were sentenced on 6 April and submitted petitions the same day. The reviewing officer, Major W. Chambers (AALC) who was Acting Chief Legal Officer for 8MD, headquartered at Rabaul, went through the proceedings and concluded on 17 April that the findings and sentence could be confirmed.[37] The Judge Advocate General (JAG), William B. Simpson, based in Canberra, considered the petitions and went through the proceedings, producing a seven-point summary and concluding that the findings and sentence should stand.[38] This was dated 22 May. Then the Deputy Adjutant-General of the Directorate of Prisoners of War and Internees (DPW&I), Brigadier Walter J. Urqhuart, reviewed trial proceedings, petitions and the JAG's advice on 7 June and did not disagree. Following all this advice, General Sturdee on 11 June confirmed the findings and sentences, which were then promulgated to the convicted men on 25 June. They were hanged at Rabaul the next morning. Can an eleven-week process of review be judged summary justice, as implied by the authors?[39]

This article has been discussed at length because it shows the need for those working on the Australian trials to avoid general assertions about the quality of military justice based on merely two cases and two trial transcripts. These two

[33] 'More Verdicts Follow Jap Hangings', *Sun* (Sydney), 7 April 1946.

[34] It was actually ten minutes, NAA Canberra, A471, 80782, 34.

[35] Moyes had presided over nine earlier trials in Rabaul and Ogle had been a court member for six earlier trials. Admittedly, the other two members of the court were having their first experience.

[36] Creed, above n 15, 47, 50.

[37] See his one page review in the trial transcript, NAA Canberra, A471, 80782, 13.

[38] NAA Canberra, A471, 80782, 5–6.

[39] It is possible Creed et al meant the one day interval between promulgation and hanging was brief. The author is preparing an essay on death sentences which discusses the disciplinary reasons for executing a war criminal the morning after promulgation.

cases were exceptional in attracting death sentences for crimes where the victims had not died[40] and should be treated as exceptions. Also, trial transcripts need to be supplemented by the extensive contemporary accounts available to the researcher. Those who have conducted much wider research across the whole series of the Australian-run trials—Sissons, Carrel and Pappas[41]—are less hasty to condemn Australian military justice.

Sissons, who worked through all 300 cases, laid the main criticisms of the Australian-run trials at the feet of the War Crimes Act which federal parliament had passed in October 1945 with little or no debate.[42] The War Crimes Act, Sissons argued, was discriminatory in several aspects, denying the Japanese suspect safeguards available to Australians. He and those who have built on his work perceive a number of flaws in the way the trials were set up and, to some extent, conducted. These relate to admissible evidence, joint trials, language difficulties and inconsistent sentencing.

(III) Admissible Evidence

Although the admissibility of affidavits and hearsay was a common feature of war crimes trials of the immediate post-war period,[43] section 9 of the War Crimes Act has been a principal source of disquiet for those critiquing the Australian trials.[44] Section 9(1) stated:

> At any hearing before a military court the court may take into consideration any oral statement or any document appearing on the face of it to be authentic, provided the statement or document appears to the court to be of assistance in proving or disproving the charge, notwithstanding that the statement or document would not be admissible in evidence before a field general court martial.[45]

This 'dispensation from the traditional rules of evidence'[46] has been seen as a major disadvantage for the accused, whose defence officer was thereby deprived of the 'very valuable right to confront the witness and test the evidence by cross-examination'.[47] Not surprisingly, the prosecution made considerable use of

[40] Sissons, above n 17, 2980, 2981.

[41] See the work by Carrel, above n 4; Pappas, above n 16; Sissons, above n 19.

[42] Commonwealth, *Parliamentary Debates*, Senate, 4 October 1945, 6463; Commonwealth, *Parliamentary Debates*, House of Representatives, 4 October 1945, 6510.

[43] See, for example, the practice relating to evidence in the Nuremberg military tribunals and in the British war crimes trials in Hong Kong, discussed in Kevin J.Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: Oxford University Press, 2012), Chapter 6 and Suzannah Linton, 'Rediscovering the War Crimes Trials in Hong Kong, 1946–48,' *Melbourne Journal of International Law*, *13* (2012), 1, 25, respectively.

[44] There are substantial sections in the two theses. See Pappas, above n 16, 95–99 and Carrel, above n 4, 94–5, 172–80. See also a summary by Okada, above n 15, 47, 56–9. This article appears to be a précis of the arguments and evidence produced by Sissons, Pappas and, in particular, by Carrel.

[45] War Crimes Act 1945 (Cth), section 9.1.

[46] Carrel, above n 4, 94.

[47] Sissons, above n 17, 2980, 2980. However, the two Chinese female victims in the cases discussed by Creed et al were present and were cross-examined. This makes the title of their article quite misleading: Creed, above n 15, 47.

this liberal provision concerning admissible evidence and built their cases to a large extent upon statements and documents. Most cases in the Australian series of trials included as staples, the statements and affidavits collected from prisoners of war soon after they were recovered from liberated camps following the Japanese surrender.[48] Rarely were former prisoners of the Japanese flown to the island locations of the trials to present their evidence in person. Among the few times victims appeared as witnesses were during those cases involving the Sandakan-Ranau death marches across Borneo. One of the six survivors—Warrant Officer William Sticpewich—appeared at three trials at Labuan.[49] He and two other survivors—Private Keith Botterill and Corporal William Moxham—testified in person at the Rabaul trial of Captain Yamamoto Shoichi and ten others in May 1946.[50] Other examples include the appearance of a Dutch prisoner of war, Staff Sergeant Fredrik Waaldyk, at the only trial held in Ambon, fortuitously available because he had remained on Ambon after his liberation from the notorious Tan Toey prisoner of war camp. He was married to a local inhabitant.[51] Another instance occurred at the Rabaul trials when Jemadar Chint Singh, an Indian Army prisoner of the Japanese from the time of his capture at the fall of Singapore, returned to give evidence at the 'Command Responsibility' trials of 1947.[52] These were the exceptions. In the context of post-war shortages of air transport and the debility of most prisoners of war in the first years after repatriation, insistence upon former prisoners attending the court in person would not have been feasible.

Even at the time there was some concern about this 'dispensation'. An AALC officer, Captain Maxwell R. Ham, was asked to write a legal opinion on Australia's right to try war criminals in general and on section 9 of the War Crimes Act in particular. Although Ham acknowledged using affidavits and statements in the absence of actual witnesses to be cross-examined was not consistent with the hearsay ruling of Australian domestic law, he pointed out that the defence could also use such materials.[53] His opinion was sought in September 1946 when the trials had been underway for ten months with several Rabaul cases highlighting contentious issues. One in particular used hearsay. Both the defending officer, Captain

[48] Even so, Major D.E. Cleverly, writing his report on the war crimes work of the DPW&I, recommended special training for those selected for questioning war crimes victims and witnesses 'as in many cases affidavits received by the Directorate were not suitable for use by the prosecution and had to be returned for correction': NAA Canberra, A7711, Vol 1, 419.

[49] Trial of Staff Sergeant Sugino Tsuruo, A471, 80716; Trial of Captain Hoshijima Susumu, A471, 80777; Trial of Civilian Hayashi Yoshinori and two others, A471, 80779.

[50] Trial transcript, NAA Canberra, A471, 81029.

[51] Memo: Sergeant Waaldyk NEI Army—Retention in Ambon, 20 October 1945, NAA Melbourne, MP742/1, 336/1/395. According to a Progress Report, 19 October 1945, in the same file, sorting out those to be accused was delayed by Waaldyk's weakness but they waited for he was the 'most important informant'. See his evidence, Trial of Captain Shirozu Wadami and 90 others, NAA Canberra, A471, 81709.

[52] For example, he testified at the trial of Lieutenant General Adachi Hatazo in April 1947, NAA Canberra, A 471, 81652. He had stayed behind for some months after liberation to identify suspects and had thereby survived a plane crash which killed the ten Indian prisoners who had been recovered with him. He had returned to India before coming back to Rabaul in 1947.

[53] Minute paper, Dept of Army, written by Captain Ham for the Director of Legal Services, 9 September 1946, NAA Melbourne, MP742/1, 336/1/980.

Lyston A. Chisholm, and the Judge-Advocate, Captain J.H. Watson, expressed concern about accepting this as evidence in relation to one of the accused but, on review in May 1946, the JAG had concluded the evidence sufficient to justify the finding of guilty. In an unusual turn, this case was reviewed once more by the JAG in October 1947 following a petition for retrial. However, he did not change his position.[54] That this case should be revisited in several ways over an eighteen-month period seems indicative of an intention to ensure justice had been done and to negate suggestions of wholesale vengeance.

Another Australian legal officer, Lieutenant Colonel Benjamin J. Dunn, also pondered the question of admissible evidence. Within three months of his work at Morotai as reviewing officer and deputy Director of Legal Services there, Dunn published an article comparing the Australian legal basis for its trials with that of Britain and the US. In considering section 9, he conceded that '[t]hese provisions are so foreign to the rules of evidence applicable to a criminal trial by British courts that some lawyers may be critical of them' and he assumed that 'expediency was largely responsible for this modification' but he pointed out that the onus was still upon the prosecution to prove the offence beyond reasonable doubt.[55] That contemporary legal officers were considering this question at all suggests to me a determination to be seen as fair in the conduct of the trials.

(IV) Holding Group Trials

Another concern about the Australian trials expressed by contemporaries and later critics related to the practice of holding group trials as permitted by Regulation 12 accompanying the Act, which stated that:

> Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as prima facie evidence of the responsibility of each member of that unit or group for that crime.[56]

Anyone charged as part of such a group was not permitted to apply for a separate trial.

Questions have been raised about the fairness of trying large numbers of suspects together. The examples cited always refer to the same two trials, one with ninety-one accused[57] and another with forty-five accused.[58] However, the average number of defendants tried in any one trial was three. There were only fourteen

[54] See transcript, Trial of 2nd Lieutenant Tasaka Mitsuo and two others, NAA Canberra, A471, 80978.

[55] Benjamin J Dunn, 'Trial of War Criminals,' *Australian Law Journal*, *19* (1946), 359, 361. He had been Reviewing Officer for eight of the early trials held at Morotai in December 1945.

[56] Appendix D: Regulations for the Trial of War Criminals. Statutory Rules 1945, Carrel, above n 4, 271–3. For discussions of the legal issues, see Pappas, above n 16, 98, Carrel, above n 4, 167–70.

[57] Trial of Captain Shirozu Wadami and 90 others, NAA Canberra, A471, 81709.

[58] Trial of Staff Sergeant Matsutaka and 44 others, NAA Canberra, A471, 80754.

Australian cases (or 4.7% of all cases) where ten or more suspects were prosecuted, twelve of them involving between ten and seventeen men.[59] They were aberrations and selecting them as typical examples should be avoided.

When these cases reached the JAG of the time, both men complained of the scale of evidence they had to work through. J. Bowie Wilson, the JAG reviewing the Labuan trial of forty-five guards for ill-treatment of prisoners held at Kuching camp in British North Borneo, found the trial 'unsatisfactory'. He complained that the 'great number of the accused tried jointly made it extremely difficult to follow and to allocate the evidence to the individual'.[60] His replacement as JAG, William B. Simpson, made 'a most emphatic protest' the following month when he got the documents for the Ambon-Morotai mass trial of ninety-one Japanese who were accused of ill-treatment of prisoners of war at Tan Toey camp in Ambon, where the death rate reached seventy-seven per cent.[61] Simpson spent 'six full days on this file' and worried that he might have overlooked 'through sheer inability to remember some cogent detail…something in favour of one or other accused'.[62] Mass trials on this scale were never held again—an indication that the possibility of unfairness in this approach was recognized. These two had been early trials in the whole sequence and it seems the courts learnt their lesson about the difficulties involved in adopting such a procedure.

(V) Language Difficulties

In February 1946, the Japanese defence counsel in the mass trial of the Tan Toey guards, Somiya Shinji, raised the problem of language difficulties, arguing that the accused were 'unable to defend themselves sufficiently' because they could not express 'in an exact and accurate manner what they wanted to state'. He also pointed out that their 'way of thinking was different from that of other nations owing to the difference in thought and feeling between them'.[63] This is a criticism of some substance.

Japanese lawyers for the defence appeared for the first time at Labuan, a week ahead of their use at Rabaul and nearly two months before their use in the Morotai trials.[64] Colonel Yamada who, with Major Hayasaki, began appearing for the

[59] Carrel, above n 4, 167.

[60] J. Bowie Wilson to DPW&I (for Convening Authority), 4 March 1946, Minute Paper, Trial of Japanese War Criminals, NAA Canberra, A471, 80754 PART 1, 6. This was one of Wilson's last cases and one can speculate that it played a part in his replacement by Simpson. Wilson retired on 31 March 1946.

[61] The death rate was nearly twice that on the Burma-Thailand railway 'at its worst'. See Joan Beaumont, 'Gull Force Comes Home: The Aftermath of Captivity,' *Journal of the Australian War Memorial, 14* (1989), 43. For an extensive study of Tan Toey, see Joan Beaumont, *Gull Force: Survival and Leadership in Captivity, 1941–1945* (Crows Nest, NSW: Allen & Unwin, 1988).

[62] W.B. Simpson to AMF HQ (for DPW&I), 24 April 1946, NAA Canberra, A471, 81709 PART 1, 9.

[63] This was part of his closing address, NAA A471, 81709 PART 1, 464.

[64] Colonel Yamada and Major Hayasaki were the first defending officers in early trials at Labuan before being augmented by other Japanese counsel in later trials. The Rabaul trials had Japanese defence counsel from the first trial there on 12–13 December, eight days after their first use at Labuan.

defence at Labuan in December 1945 spoke excellent English and had completed his education in England. With Hayasaki, he had formerly been a member of the Japanese civil administration in Borneo.[65] Even if Yamada had formal legal training and had some advantage in his linguistic abilities, he was not accustomed to Australian military courts. In the first trial at Labuan, 'Captain Brereton took the unusual course for a prosecutor of going out of his way to assist Yamada by explaining law and court procedure and by allowing him latitude in his handling of witnesses'. Yamada returned the favour by often assisting the interpreters 'explaining some fine shade of meaning of a Japanese phrase'.[66]

The language problems and cultural misunderstandings created by the co-existence of Anglophone president, court members, prosecution and sometime defence counsel, with defendants who might be not only Japanese but Korean or Taiwanese, calls for a study in itself. Added to this mixture were Japanese defence counsel operating in an unfamiliar legal system and witnesses, belonging not only to language groups previously mentioned, but sometimes including Malays, Indonesians, New Guinea indigenous and other islanders. The possibilities of mutual incomprehension were boundless. The longueurs of the translation and checking process, particularly in the humid conditions of some of the island locations, could send not only defendants to sleep but endangered the alertness of the court members. However, when General Imamura Hitoshi and the military policeman guarding him dozed off during his trial at Rabaul it was the president of the court, Major General J.S. Whitelaw who woke them up.[67] During the trial of Lieutenant Asaoka and two others for executing captured Royal Australian Air Force crew, held at Morotai in December 1945, several nurses who had come to watch were at first 'all keenly interested' but they became distracted by the long delays while the interpreters made sure the witnesses and accused understood completely the counsels' questions.[68]

The number of interpreters on offer from the Allied Translator and Interpreter Service (ATIS) even when supplemented by nisei serving in the US Forces was extremely limited and the standard of some of the rapidly trained Australian interpreters was variable.[69] At the Rabaul trials, the principal interpretation was

Japanese defence counsel did not appear at Wewak and were not used at Ambon and Morotai until late January 1946. They were first used there in the mass trial of ninety-one accused.

[65] Eric Thornton, 'Massacre of 44 POW's [sic]: Jap Sergeant Faces Trial', *Argus* (Melbourne), 4 December 1945, 16.

[66] Eric Thornton, 'Jap Lawyer Invites Prosecutor to be his Guest in Japan', *Argus* (Melbourne), 7 December 1945, 20. The invitation to visit was extended by Yamada to Brereton.

[67] Ishimura Kei, *Beyond the 'Judgement of Civilisation': The Intellectual Legacy of the Japanese War Crimes Trials, 1946–1949* (Tokyo: International House of Japan, 2003), translated by Steven J. Ericson, 311. A strategy to keep alert, adopted by Major Kenneth J. Prowse, president at three of the Labuan trials, was to take notes in a ledger. The ledger is now in the National Library of Australia: NLA MS 5722, Prowse Papers, Folder 1.

[68] 'Their interest begins to wain [sic]', Australian telegram from ABC reporter, Talbot Sydney Duckmanton, 5 December 1945, Australian War Memorial (AWM), PR00238, Duckmanton Papers. For the trial, see Trial of Lieutenant Asaoka Toshi and two others, NAA Canberra, A471, 80717.

[69] Colin Funch, *Linguists in Uniform: The Japanese Experience* (Melbourne: Japanese Studies Centre, Monash University, 2003) provides a full account of ATIS.

done by Japanese interpreters 'who all spoke excellent English'. The Australian linguists adopted the practice of monitoring their translations and interceding when they 'felt that the Court or the accused or Counsel may have misunderstood an interpretation'.[70] Even so, Lieutenant Joseph da Costa, one of the most fluent of the ATIS interpreters at Labuan, was concerned that suspects did not grasp what was going on. He had been educated in Japan, before his evacuation to Australia in 1941 on one of the last ships to leave. His spoken Japanese, acquired from his nanny, was 'excellent'.[71] He was, however, not familiar with specialized military terms or medical terms in Japanese; words that had to be used during the trials. Worried and conscientious, he adopted the practice of visiting the specific prisoner in the evening to go over the day's proceedings to ensure that the suspect knew what had been said during the day. He did not want them to be unaware of the implications of the prosecuting counsel's questions.[72] In adopting such strategies, the ATIS interpreters attempted to remedy the translating deficiencies.

Occasionally, the courts could take advantage of the presence of a chance linguist, such as the official Dutch observer at the Darwin trials, Major J.M.L. Hosselet, Judge-Advocate in Australia for all Dutch troops. The crimes being tried at Darwin had taken place in Dutch Timor and among the witnesses were local villagers. A prisoner of war in Java for over three years, Hosselet was skilled in several languages, assisting the court at times during the trial.[73] At Rabaul, in four cases involving the torture of German-speaking priests, nuns, Chinese and local civilians based at the Ramale Mission, a Chinese civilian, Frederick Chan, and two of the priests acted as interpreters when the victims gave their evidence.[74]

Despite these makeshift solutions, however, there were never enough competent interpreters to ensure all defendants and witnesses understood the implication of questions. Undoubtedly, the standard of linguistic proficiency in many cases did not match the requirements expected at war crimes trials today. However, it is anachronistic to judge the provisions made by current standards. In considering the question of fairness, the good intentions and the compensatory strategies adopted should be taken into account and wholesale condemnation of the trials, citing this factor, should be rejected.

[70] Letter from Mr John Ferris to the author, 26 January 2010. This was confirmed in my interview with Mr John Hook (Melbourne, 11 March 2010). Mr Ferris and Mr Hook had been interpreters with ATIS at Rabaul.

[71] Arthur Page, *Between Victor and Vanquished: An Australian Interrogator in the War Against Japan* (Loftus, NSW: Australian Military History Publications, 2008), 475. Page (born Papppadopoulos) knew da Costa in Japan when they were schoolboys.

[72] Interview with Colonel da Costa (Melbourne, 12 March 2010).

[73] He was officially credited as interpreter in the second Darwin trial, NAA Canberra, A471, 81630.

[74] Father Hohne interpreted at two Rabaul trials, NAA Canberra A471, 80745 and NAA Canberra, A471, 80744; Father Zwinge and Mr Chan interpreted at two more, NAA Canberra, A471, 80743 and NAA Canberra, A471, 80741.

(VI) Inconsistency in sentencing

Those criticizing the Australian-run trials point to the inconsistency in sentencing as a major issue. There were no general guidelines to sentencing policy or tariffs.[75] Earlier trials eventuated in harsher sentences than later trials. Death sentences were more frequently awarded. In the first month of the trials, sixty-two per cent of the accused were sentenced to death whereas the figure is only twenty per cent for the Manus trials in 1950–1, despite the Manus cases being selected on the basis they were likely to attract the death sentence.[76]

In one case, Lieutenant Katayama Hideo, tried in Morotai in March 1946 and sentenced to death for his role in executing one of four downed airmen, lived long enough to see that accused in later trials were awarded lesser sentences, including a case at Rabaul in which Captain Noto Kiyohisa had been found guilty of a similar crime—the murder of three prisoners of war—but had received only a twenty-year sentence.[77] Katayama had been kept alive for over a year after one of his co-accused had been shot by firing squad as he was needed as a witness at a later case. He appeared at the Rabaul trial of Captain Kawasaki who was alleged to have conveyed the order to Katayama to execute the captured prisoners.[78] In the meantime, as a fluent English speaker, he was found to be extremely useful translating documents for the Australians. Three weeks before the execution of Katayama, Major Herbert F. Dick, prosecuting officer in the Kawasaki case, submitted a detailed minute paper, arguing for mitigation of Katayama's death sentence. One of his arguments was on the grounds of consistency of sentencing. Dick pointed out the discrepancy of awarding a twenty-year sentence to Noto, a more senior officer, for a similar crime.[79] Despite this argument as well as petitions from all in the Rabaul compound and delaying tactics by the Australian Commandant in promulgating the warrant of execution—Brigadier Neylan hoped that new instructions would arrive from Melbourne—Katayama faced a firing squad on 23 October 1947.[80]

One reason for inconsistency in sentencing lies in the fact that trials were being held concurrently in the first few months at several different locations,

[75] General Douglas MacArthur, Supreme Commander for the Allied Powers, had issued directions for trials held in his area of responsibility: Pappas, above n 16, 283.

[76] The figures are given by Pappas, above n 16, 153. For the policy on selecting the final cases for trial at Manus, see NAA Melbourne, MP742/1, 336/1/2076. For the division of cases ready for trial into categories to see which ones should go forward to trial, see NAA Canberra, A4940, C2.

[77] Trial of Naval Captain Noto Kiyohisa, NAA Canberra, A471, 81210, held on 9–10 July 1947.

[78] Trial of Captain Kawasaki Matsuhei, NAA Canberra, A471, 81067. One of the last cases tried at Rabaul, it was heard in late June and early July 1947. Kawasaki was found not guilty in a case of some complexity. The chain of command was difficult to establish but it became clear that a far more senior officer, Baron Takasaki, had some questions to answer.

[79] Minute paper by Major H F. Dick for DPW&I, 1 October 1947, NAA Melbourne, MP742/1, 336/1/1737.

[80] This is a very well documented case with several Japanese and Australian contemporary sources providing much detail about his last days. The Katayama case also featured in *Blood Oath*, a film which should be treated with great caution, Hank Nelson, ' "Blood Oath": A Reel History', *Australian Historical Studies*, *24* (1991), 429.

not allowing court members therefore to learn from each other. The first trials at Wewak, Morotai and Rabaul all begin in early December 1945 within days of each other. Each court had, of course, completely different personnel as president, court members and legal officers. In the temporary courts of Wewak, Morotai and Labuan, held in those particular locations to take advantage of the availability of Australian forces, there were lots of officers for the Convening Authority to press into service. In those temporary courts, there was a great turnover in personnel, militating against the build up of even personal consistency, much less a consistency for the court as a whole.[81]

In the later and longer-running courts at Rabaul, Singapore and Manus Island, individual presidents, court members and counsel built up much experience with which to measure the heinousness of one crime as against another. Lieutenant Colonel C.H. Smith was president or member of more than eighty Rabaul trials, including the 'Command Responsibility' cases. Lieutenant Colonel C.R.E. Jennings was president of fourteen of the twenty-three trials held in Singapore. Particular courts in the one location might develop some consistency, not only because they were run by overlapping personnel but also because they focused on a particular atrocity or set of related atrocities. This was the case in the Singapore trials, eighteen of which related to crimes committed against prisoners of war building the Burma-Thailand Railway. Although Captain A.D. Mackay sat as president in only one of the Singapore cases—a Burma-Thailand railway case heard on 10 and 12 March 1947[82]—he had built up some expertise as the prosecuting officer in eight earlier cases, five of them concerning crimes committed on the railway. He then continued to prosecute cases in Hong Kong.

Other personnel were moved from one location to another such as Major Dick, Lieutenant Colonel John T. Brock and Major Henry J. Foster. The breadth of experience gained in different postings gave these individuals the opportunity to develop some perspective and may be a partial explanation as to why later sentences were more lenient than earlier ones for very similar crimes.

Inconsistency was also apparent in the tariffs awarded to senior officers as compared with the junior officers who had carried out their orders. At a trial in Rabaul in April 1946, two non-commissioned officers and seven Formosan civilians were sentenced to death for the execution of sick Chinese prisoners of war.[83] Four were hanged on 17 July 1946 after the various stages of petition and review but the remaining five—all Formosans—were kept alive to give evidence at the trial of Major General Hirota Akira who had given the original order.[84] Tried in March and April 1947, Hirota only got seven years' imprisonment.[85] Following

[81] See Pappas, above n 16, 280–1 for a discussion of the lack of information given to courts about JAG's opinions where the findings had been overturned.

[82] The trial of Korean Guard Hayashi Eishun, A471, 81695 is critiqued by McCormack, above n 14, 85, 90–1.

[83] Trial of Sergeant Matsushima and eight others, NAA Canberra, A471, 80915.

[84] David Sissons, 'The Australian War Crimes Trials', typescript draft, 16 August 1985, for *Sydney Morning Herald* (Sydney), 10 (in the possession of the author).

[85] Trial of Major General Hirota, NAA Canberra, A471, 81653. This is one of the 'Command Responsibility' trials.

the intervention of the president of the court, Major General J.S. Whitelaw, and a recommendation from the JAG that such a long detention awaiting death should justify commutation, the five Formosans were reprieved—too late for the four men already hanged.

Of all five 'command responsibility' trials, only Lieutenant General Baba Masao received a death sentence.[86] The burden of guilt for the war crimes committed tended to be placed on the shoulders of the privates and junior officers, not at the feet of those who passed the orders down the chain or were responsible for the policy that led to the atrocities.

(VII) The Review Process as a Safety Net

Although there are some well-known cases where either the finding or the sentencing tariff seems questionable, as in the Katayama case discussed earlier, many apparent injustices were caught by the review process. When Private Fukushima was found not guilty of murdering an Australian prisoner at Ranau in Borneo, a new court, with different personnel,[87] was assembled the next day and he was re-tried on the same charge but as a civilian. The second court found him guilty. A blatant miscarriage of justice, however, was averted when the JAG pointed out that the principle of double jeopardy still applied to war crimes suspects. He advised Sturdee not to confirm the sentence.[88]

There are other examples where the review process provided a safety net. In the first cannibalism trial at Wewak, Lieutenant Tazaki admitted that he had mutilated and cannibalized the body of a dead Australian soldier when severely malnourished and suffering from malaria. Although his defending officer (Captain Jack Watson) argued that he was temporarily insane at the time, he was sentenced to death by hanging, the first death sentence to be awarded in the whole series of Australian-run trials.[89] The convicted man did not petition so his case was not sent to the JAG but was sent to the Convening Officer who was advised by the Chief Legal Officer. Luckily for Tazaki, the reviewing officer, Brigadier Alan S. Lloyd, recommended commutation on several grounds, including the conditions facing Tazaki at that late stage of the war, and that recommendation was followed.[90] Tazaki's death sentence was commuted to five years with hard labour.[91]

[86] Trial of General Baba, NAA Canberra, A471, 81631.

[87] With the exception of the Japanese defence counsel.

[88] Trial of Private Fukushima Masao, NAA Canberra, A471, 81060, held 28–29 May 1946, and Trial of Civilian Fukushima Masao, NAA Canberra, A471, 81218, held 30–31 May 1946.

[89] There is silent film footage of his being questioned and of his trial in the collection of the Australian War Memorial, See 'Interrogation of Suspected War Criminals', F07377 and 'War Crimes Trial of Lieutenant Tazaki', F07379. Both films reveal his emaciated state even after several months following the cannibalism committed in July 1945.

[90] Trial of Lieutenant Tazaki Takehiro, NAA Canberra, A471, 80713.

[91] The commutation was dated 19 December 1945. To what extent the commutation had been influenced by a campaign (alleging bias) by war correspondent, Noel Ottaway, and his editor, John Goodge of the Sydney *Sun*, whose letters found their way into many ministers' files, is hard to ascertain.

In cases where there were petitions, then the petitions and trial transcripts were forwarded by the Convening Officer to Army headquarters in Melbourne for review. The Director of Legal Services would examine court proceedings and advise whether the court was legally convened and properly constituted, the charges properly drawn and whether the sentence was valid and should be confirmed. Proceedings then went to the JAG. He would advise on whether petitions should be upheld or dismissed and whether there was any reason for not confirming the finding and the sentence. All this legal advice would be considered by the Confirming Authority, Acting Commander-in-Chief General Sturdee, before confirming or changing the finding or sentence.[92]

Indeed, the multiple steps of reviewing a case frequently overturned or mitigated a sentence. There were 214 death sentences passed by Australian courts, yet only 148 of these were confirmed.[93] In February 1946, Sturdee commuted twenty death sentences handed out at two early Labuan trials in December 1945.[94] For those trials that concluded between November 1945 and 31 January 1946, Sturdee commuted a total of twenty-eight of the death sentences to terms of imprisonment.[95] In these cases he followed the advice of the then Judge Advocate General, J. Bowie Wilson. Wilson, for example, recommended that the twenty subordinates, tried for the Riam Road massacre, be given ten-year sentences on the grounds that 'it is impossible to believe that these men were competent to judge between a legal and an illegal order'.[96] Sergeant Sugino, however, who had given the order to bayonet and kill the prisoners, had his death sentence confirmed.[97]

These particular commutations caused a huge outcry. Returned servicemen and other organizations complained to Members of Parliament.[98] When they, in turn, sought explanations from the Minister for the Army, Forde responded that this power had been delegated to Sturdee who was 'not interfered with by the Government or any other authority in the impartial exercise of his discretion'. Forde argued that it was just the same as the government not interfering with decisions of the domestic courts.[99]

[92] Carrel above n 4, 95–8.

[93] Table C, Carrel above n 4, 101.

[94] Trial of Sergeant Miura and fourteen others, NAA Canberra, A471, 81214 and Trial of Guard Hirota and eight others, NAA Canberra, A471, 81204. These concerned the Riam Road massacre of prisoners of war in Borneo.

[95] They comprised commutations of death sentences given at Labuan (twenty-two), Rabaul (three), Morotai (two), Wewak (one). See Carrel, above n 4, 126.

[96] See Carrel, above n 4, 162.

[97] Trial of Sergeant Major Sugino, NAA Canberra, A471, 80716.

[98] Those organizations sending protest resolutions passed at meetings and found in Department of the Army files included the Australian Labour Party Paddington Branch (15 March 1946), NAA Melbourne, MP742/1, 336/1/981, Ipswich branch, Returned Sailor's Soldier's Airmen's Imperial League RSSAILA (27 February 1946), Australian Prisoners of War Relatives' Association (4 March 1946) and Australian Legion of Ex-Servicemen and Women (1 April 1946), NAA Melbourne, MP742/1, 336/1/555.

[99] Francis Forde's reply to P.J. Roche, Secretary, Ipswich branch, RSSAILA, 29 March 1946, NAA Melbourne, MP742/1, 336/1/555.

Of the 643 guilty sentences awarded, 130, or twenty per cent, were mitigated, commuted or not confirmed.[100] Of these, twenty-six fell into the latter category.[101] The second Judge Advocate General, William B. Simpson, who replaced J. Bowie Wilson on 31 March 1946, had a considerably higher success rate in getting Sturdee to act on his recommendations for changes to findings or sentences than did his predecessor. Wilson had sixty-nine per cent of his recommendations for change ignored, compared to Simpson's eighteen per cent. This difference has an obvious bearing on the perception that the sentencing in the earlier trials was harsher.[102] Wilson opposed death sentences on junior men, whereas Simpson had less concern about that, arguing that massacres were so obviously wrong, the rank of the perpetrator was irrelevant.[103]

The Australian acquittal rate was also high compared to the other Allied war crimes trials. The Australian courts acquitted 29.31 per cent, surpassed only by China's rate of 39.64 per cent. The overall Allied rate of acquittal was 18.9 per cent.[104] This cannot be explained as a consequence of prosecuting 'even minor offences' as claimed by Okada.[105] Crimes prosecuted included torture, rape, ill-treatment resulting in large-scale deaths, massacres, executions of captured prisoners, none of which could be described as minor.

(VIII) 'Victor's Justice'—Evidence from the Participants

While historians and lawyers continue to debate the question of 'victor's justice', it is interesting to read what contemporaries thought. In December 1945, F.R. Sinclair, Secretary of the Department of the Army, asked his Minister how posterity might judge the Australian-run trials. He pointed out that 'the motives which underlie our activities in bringing our former enemies to trial cannot be said to be altogether dis-interested or unbiased'.[106] He was uneasy about the death sentences which gave the victors power to hang or shoot the vanquished in a system where all the stages of reviewing under the War Crimes Act were to be done by the military themselves.[107] That he won the concession of having the JAG, a civilian adjudicator, brought into the process, was, Sissons pointed out, down to his 'hard

[100] Pappas, above n 16, 132.
[101] They comprised cases at Morotai (one), Rabaul (twenty-two), Singapore (one), Hong Kong (one) and Manus (one), See Sissons, above n 18, Table A, n 9.
[102] Pappas, above n 16, 150.
[103] Pappas, above n 16, 146–7.
[104] See Table E, Carrel, above n 4, 102.
[105] Okada, above n 15, 47, 50. She also claimed that the acquittal rate at Manus stemmed from the choice of crimes being prosecuted, but see n 75. Manus cases were chosen because they involved murders and other serious crimes and so were likely to attract the death sentence.
[106] Sinclair to the Minister, Dept of Army, 6 December 1945, NAA Melbourne, MP742/1, 336/1/980.
[107] Sturdee, the Commander in Chief of the Army, was given sole authority to confirm the death sentence. This differed from the Field Courts Martial practice of confirmation resting with the Governor-General in Council. For the procedure for confirmation of death sentences, see Minute Paper, Trials of War Criminals, December 1945, NAA Melbourne, MP742/1, 336/1/382.

fought battle'.[108] Sir William Webb, whose advice was sought and was soon to be presiding over the IMTFE, was quite scathing about Sinclair's doubts, writing to Sinclair's Minister, Frank Forde:

> Apparently Mr Sinclair thinks we owe the same duty to the Japanese guilty of war crimes as we do to our own soldiers guilty of breaches of military discipline. I respectfully suggest that this is a wholly erroneous view. It is certainly contrary to international law, which merely requires a fair trial for enemies charged with breaches of the rules of warfare.[109]

Webb argued that war criminals were like pirates or brigands and that different rules should be applied to them.

A surprising number of people involved in the trials—both Australian and Japanese—have left accounts. One of the most detailed was a diary kept by Captain Athol Moffitt, the prosecuting officer in some of the trials held at Labuan in January 1946. Written on the same evening or the day after the events described, the diary provides the uncensored views of a young officer, trying to prove that Captain Hoshijima, the commandant of Sandakan camp, was directly responsible for the deaths of over 1,000 prisoners who died of starvation during his time of command.[110] It was, Moffitt wrote, 'easy to prove cruelty' as he had fifty statements detailing many incidents during the years that Hoshijima ran the prisoner of war camp. However, he expected the Japanese defence to argue that the Allied bombing campaign had reduced rations. He was sure that this was not the true reason 'but the evidence we have that H[oshijima] was a party to this starvation is not yet watertight'. He was investing much hope in Sticpewich, one of the six survivors from the Sandakan death marches, who was daily expected at Labuan as a witness. In the meantime, he thought the Japanese might give a lead. He wrote, 'I will ferret them out and see what I can get'.[111] The next day, he questioned the Japanese quartermaster, who, to Moffitt's delight, connected the cutting of the rice ration to an order from Hoshijima. It was the next sentence in the diary which attracted my attention: 'His evidence is so important that I had it read over to him 3 times and had him say it was quite correct.'[112] This was the central piece of evidence that convicted Hoshijima and brought him to the scaffold two months later, but the sentence might also indicate an effort to be fair. Was Moffitt, by asking for repetition, warning—'[d]o you realise what you have just admitted? Do you really mean what you have just said?' Obviously, much more work is needed on this text, but the point is that the diary provides another type of source—apart from trial transcripts and government files—for investigating the fairness of the trials.

Several of the Japanese convicted published accounts after repatriation to Japan in the 1950s, including memoirs by General Imamura Hitoshi, Commander of

[108] Sissons, above n 86, 6. The decision to appoint a civilian as JAG arose after World War I out of a desire to give the position some independence from the Army, Report, 'Draft Historical Notes JAG's Department and Australian Army Legal Division', cited in Pappas, above n 16, 145.
[109] Webb to Forde, 8 Jan 1946, NAA Melbourne, MP742/1, 336/1/980.
[110] Trial of Captain Hoshijima, NAA Canberra, A471, 80777 PART 1 and 80777 PART 2.
[111] Diary entry for 2 January 1946, Diary of Athol Moffitt, AWM PR01378, Moffitt Papers, 137–8.
[112] Diary entry for 3 January 1946, Diary of Athol Moffitt, AWM PR01378, Moffitt Papers, 138.

the Japanese forces in New Guinea, New Britain and other islands,[113] tried at one of the 'Command Responsibility' trials in 1947. He objected to the acceptance of hearsay contrary to the usual rules of evidence in British and Australian law. Lieutenant Katayama Hideo, executed in October 1947, smuggled out volumes of a diary which were subsequently published in Japan after his death.[114] Another Japanese diary was kept by Captain Kokaze Ichitano, who was posted as a defence officer to the war crimes court at Rabaul in January 1946.[115] These and other Japanese sources deserve a separate study.

One contemporary account from Somiya Shinji, the Japanese defence lawyer at the mass trial of ninety-one Japanese suspects, was published in 1946 before Judge Pal's judgment on the fairness of the IMTFE was made known and gained such influence. Somiya's account was subsequently translated.[116] Somiya headed the defence of Captain Shirozu Wadami, commander of the 20th Garrison Unit, Japanese Navy, and the ninety others responsible for administering the Tan Toey prisoner of war camp. This trial, discussed above, began at Ambon and was completed at Morotai.[117]

Somiya, who was later Defence Counsel at one of the IMTFE trials, wrote an account of the trial which reveals, directly and indirectly, how different were the legal systems of the two countries. Among the differences that Somiya noted with approval was the way the President and court members acted as 'umpires of the games', that the defence had equal rights with prosecution, that the prosecution was required to assume the burden of proof and that the trials were open to the public.[118] He also commented upon the way witnesses were called to court 'to be questioned whenever necessary' and that the president and court members could make 'inquiries to the witness' but, unlike the Japanese system, that questioning was 'only subsidiary' to the examinations by prosecuting and defence counsels.[119] Somiya also noted that 'defending officers were allowed to communicate with defendants freely' which was a right not granted in Japan.[120] He was able to visit his clients every night.

Somiya's account also reveals the efforts made to grant the nintety-one suspects a fair trial. He was very impressed during the Ambon section of the trial when the local witnesses were tested in their identification evidence. The suspects wore different clothing and stood in a different order at repeated identification parades

[113] Imamura was tried at Rabaul, and sentenced to ten years. Imamura's memoirs, published in the early 1960s, and composed while imprisoned in Java where the Dutch also tried him, are discussed in Ushimura above n 67.

[114] See sections of Katayama Hideo, *Ai to Shi to Eien to* (Tokyo: Gendai Bungei Shuppan, 1958) translated by David Sissons in NLA MS 3092, Sissons Papers, Boxes 22, 23, 32, 33.

[115] See sections of Kokaze Ichitano, 'Shusen Zengo to Sempai Bengono Kaiso', 160–82, translated by David Sissons in NLA MS 3092, Sissons Papers, Box 32.

[116] See Somiya Shinji, 'The Account of Legal Proceedings of Court for War Criminal Suspects' (1946). This typescript translation by Kazuo Yoshioka was commissioned by John Williams, the prosecuting counsel in the trial which Somiya describes, Mitchell Library, Sydney, MLMSS 2207, Williams Papers.

[117] See above n 57.

[118] Somiya, above n 116. These novelties were also noted with approval in relation to the Tokyo Trials in 1948 by Prof. Uchida Rikizo from University of Tokyo, Totani, above n 1, 207.

[119] Somiya, above n 116, 6.

[120] Somiya, above n 116, 10.

'for fear but any misidentification on the part of the witnesses should happen'.[121] Somiya was also impressed with what happened when the Japanese Medical Officer of the Tan Toey Camp seemed likely to be trapped into self-incrimination. The Judge-Advocate, Major J.D. Bell, asked the prosecutor to stop, citing the right to silence. The Court adjourned and then resumed. Several times over the next ten days, the Judge-Advocate repeated this advice to witnesses 'whenever the prosecution's inquiries became fierce and severe and might reduce the witnesses to testify against themselves'.[122] The Judge-Advocate also came to Somiya's assistance with advice on how to conduct the defence. Rather than the long and detailed defence address Somiya had prepared, he recommended calling witnesses as required and cross-examining the prosecution witnesses.[123] In such manner and to some extent was the unequal contest between those familiar with the Australian system and those who were not remedied.[124]

When Somiya heard the verdicts and sentences, he wrote that he felt 'the trial very fair'.[125] He had expected more convictions—forty-four were found not guilty—because the case, connected with the death of over 400 Allied prisoners, had attracted such publicity. Only four of those found guilty received the death sentence.

Although Somiya had acquired some experience of procedure in an Australian military court, he still felt uncomfortable coping with an unfamiliar and culturally different system. In his next case at Morotai, he asked for and received the assistance of an Australian defence counsel, one of the practical ways being developed to compensate for the Japanese disadvantage.[126] Somiya described Captain D.M. Campbell in action in a way that not only reveals his admiration but also is a very good example of what happened in other courts and locations where Australian defence counsel fought as hard for their client as they would have in pre-war civilian law courts.[127] Somiya wrote:

> From the opening of the trial, Capt Campbell did all in his power to defend the accused; he raised objections whenever the prosecution's charges or claims were considered to infringe the principle of court proceedings or extend too far; he took objections against the prosecution's arguments, documentary evidence or witness' evidences and even against the President's interrogations.[128]

121 Somiya, above n 116, 7. 122 Somiya, above n 116, 7. 123 Somiya, above n 116, 16.

124 See also the opinion of the Judge-Advocate at that trial—Captain J. Douglas Bell—in his letter to John Williams, 7 April 1971. He felt proud that, without help from headquarters, they were able to conduct a trial that was 'not a hollow farce… convicting everybody out of hand' and that even the Japanese thought it conducted 'with restraint, dignity, fairness and justice'. Copy in possession of the author.

125 Somiya, above n 116, 34.

126 Eventually the practice settled down to a pattern where the Japanese legal officer prepared the brief while the AALC officer put the actual case in court as instructed by the Japanese, Pappas, above n 16, 139.

127 Other notable examples are Captain William Cole at Darwin and Captain Lyston Chisholm at Rabaul. Interpreter John Hook was very impressed by the diligence of the latter, Interview with John Hook (Melbourne, 11 March 2010).

128 Somiya, above n 116, 36. This type of help was not an aberration. See above n 66 outlining how Colonel Yamada, the defence lawyer, was assisted through some of the unfamiliar procedures by Captain Brereton, the prosecutor.

There are many more passages which could be quoted but this has given some of the flavour. It is but one of many contemporary documents from participants, both Australian and Japanese. These should be analysed alongside the trial transcripts and official files when exploring the question of 'victor's justice' in relation to the Australian-run trials in order to get a balanced overview.

(VIII) Conclusion

Contemporaries were aware of how the trials could be criticized. As we have seen, one senior public servant, F.R. Sinclair, expressed his concerns as early as December 1945. In September 1946, when at least half of the Australian-run trials had been completed, a legal opinion was sought about the right of Australia to conduct trials in general and the acceptance of hearsay.[129] That questions were being raised even at that late stage in the sequence of trials, demonstrates the efforts being made to achieve just outcomes.

Although it is possible to expose the weaknesses of specific war crimes trials run by the Australians in the aftermath of the Second World War and to find examples of problems relating to admissible evidence, joint trials, language difficulties and sentencing inconsistency, researchers need to take care before leaping to conclusions. The tendency to focus on a small number of cases as if they were typical (as happened in the Creed article) can be misleading. It is unfair to the personnel running the courts. The more work that is done on the whole sequence of the three hundred trials, the more evidence emerges of conscientious efforts to make up for deficiencies in the provisions of the War Crimes Act. Vengeance, an emotion associated with 'victor's justice', was much less evident in participants' papers and in official investigation and correspondence files associated with the trials than might have been anticipated.

To tread a fine line between vengeance and justice was difficult. Ron Mendelsohn, a public servant, in a comment on a cabinet submission in 1955, admitted the problem. 'But what were we to do?' he wrote. 'To allow these men to go unpunished would have done violence to our own feelings . . . we wanted to ram home the idea that to use war as an instrument of policy is evil, but that if war is to be used there are conventions of humanity to be observed.'[130]

[129] See above n 53.

[130] Ron Mendelsohn, Comments on Cabinet Submission No 316: Japanese War Criminals, 12 April 1955, NAA Canberra, A4940, C1233, quoted in Pappas above n 16, 284.

17

Justice for 'Asian' Victims: The Australian War Crimes Trials of the Japanese, 1945–51

*Narrelle Morris**

One of the common critiques of the International Military Tribunal for the Far East (the Tokyo Tribunal), held after World War II, was that it failed to systematically and comprehensively examine and address crimes committed by the Japanese against the peoples in the Asia-Pacific region, particularly those arising out of Japanese colonialism and wartime occupations, and including sexual crimes against Asian women. Representative of this criticism, for example, is Korean activist Won Soon Park's conclusion in 1997 that the Tokyo Tribunal was 'little more than a feast whose guest list included the Western Allies but blatantly omitted the Asian victims themselves'.[1]

In short, the Tokyo Tribunal has been indicted for being, amongst other things, an example of partial and selective justice along racial, colonial and gendered lines. In fact, the range and complexity of reasons behind the apparent absence of and silence regarding Asia in the Tokyo Tribunal have been articulated by many critics since the end of World War II, and contested again by others.[2] Interestingly, recent legal scholarship by historian Yuma Totani has suggested that the Asian presence—for want of a better word—in the Tokyo Tribunal was undoubtedly more vivid and influential than has often been concluded. She draws attention in particular to the efforts of several prosecution teams, including the British Commonwealth team that introduced to the Tribunal evidence of Japanese war crimes committed in a broad geographical area across South East Asia and the Pacific, many of which were committed against Asian and Pacific nationals.[3] In her view, such evidence has not

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[1] Won Soon Park, 'Japanese Reparations Policies and the "Comfort Women" Question', *Positions: East Asia Cultures Critique*, 5 (1997), 119.

[2] See, for example, Richard Minear, *Victors' Justice: the Tokyo War Crimes Trial* (Princeton, NJ: Princeton University Press, 1971) and Yuki Tanaka et al. (eds), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (Boston, MA and Leiden: Martinus Nijhoff, 2011).

[3] Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Cambridge, Mass. and London: Harvard University Asia Centre, 2008), 162–3.

taken its proper place in studies of the Tribunal due to the manner in which it was tendered and because of the dispersal of related documents. It is apparent from the scholarship of Totani and others that, even after more than sixty years of analysis, the Tokyo Tribunal is still revealing 'hidden histories' and the process of understanding the Tribunal remains ongoing.

While the proceedings, judgments and other documents of the Tokyo Tribunal have been interpreted and re-interpreted since it concluded, the Australia's subsidiary B and C class war crimes trials—300 of which were held pursuant to the War Crimes Act 1945 (Commonwealth) in Morotai, Wewak, Labuan, Rabaul, Darwin, Singapore, Hong Kong and Manus Island in the period 1945–51—have since that time been unreported and virtually unassessed. In part, this was a deliberate creation of 'hidden history' by the Australian Government as, for many years after the trials were completed, requests to access the trial proceedings were refused. The Japanese Government, for example, made unsuccessful requests in 1955 and 1959 to be granted copies of the trial proceedings. A third Japanese request came in 1965 and was considered at some length over the next few years, primarily in respect of the concern that releasing the trial proceedings might precipitate criticism of Australia. As a 1967 report into the issue of whether to grant access observed, while the trials were 'generally satisfactory' and did not cause 'any substantial miscarriage of justice':

> Since war crimes trials are a controversial issue in general, they provide material for a trouble-maker to use against the country which conducted them…Almost all of the trials of 'B' and 'C' class criminals have elements appearing on the face of the records which would provide a hostile reader with anti-Australian ammunition.[4]

One of the report's conclusions, however, was that a refusal to grant access to the trials 'might imply that we have something to hide'.[5] After considerable consultation, Australian approval was finally granted in 1968 for partial copies of trial proceedings[6] to be made available to the Japanese Government and for 'bona fide Australian Scholars' to be able to review the trial proceedings.[7] There was no suggestion made as to how applicant scholars might be determined to be bona fide, perhaps because, as of 1967, the Australian Government had 'no record of any interest ever being expressed by scholars' in the trials.[8] It was not until 1975 that the Australian public was granted open access to the trial proceedings, which had, by then, been shifted from the Attorney-General's Department to the Australian Archives. In announcing his decision to grant public access, the Attorney-General, Mr K. Enderby QC,

[4] See Lyndel V. Prott, report entitled 'Release of Records of Japanese War Crimes Trials' 5 April 1967 (National Archives of Australia (hereafter NAA): A432, 1967/2152), 1, 2, 5.

[5] Prott, 'Release of Records of Japanese War Crimes Trials' (NAA: A432, 1967/2152), 11.

[6] The copies were not to include the Judge-Advocate General's reports, pursuant to the practice not to provide such confidential and privileged reports when transcripts of Australian court-martial proceedings were ordinarily made available.

[7] See the correspondence on this issue in NAA: A432, 1967/2152.

[8] See Department of External Affairs cablegram 11 April 1967 (NAA: A432, 1967/2152).

remarked: 'For too long Australian scholars have been hampered in their attempts to interpret Australia's history. Restrictions like this one [on access to the trial proceedings] no longer serve a useful purpose . . . The past should be everyone's property.'[9]

While the trials were now open, few scholars and probably even fewer members of the public took up this call to serve as interpreters of history. It is likely that they were daunted by the prospect of having to examine and analyse tens of thousands of pages of transcript, evidence and reports with little overarching or explanatory material for guidance. There may also have been some doubt that such an effort would be worth it. The 1967 report on access had critically (and wrongly) observed that the fact that the trial proceedings lacked written judgments meant they were of 'little value for research'.[10]

While more than thirty-five years has now passed since public access was granted, the process of revealing the 'hidden histories' of the Australian war crimes trials is no less daunting. In fact, the passage of time and the passing of nearly all those Australian personnel who participated in the trials have now imposed more constraints upon our understanding of them. While the process of understanding the trials has barely begun, one of the 'hidden histories' that is becoming clear was that there was a considerable emphasis on Asian victims of Japanese war crimes, far beyond what might be expected of notionally 'Australian' trials. To be sure, a few of the Australian trial series, such as those held at Labuan, Morotai and Darwin, almost exclusively heard trials regarding identifiably Australian, British or American victims. However, in the Rabaul trial series—which encompassed more than two-thirds of all trials held, 190 trials—the overwhelming majority of the victims were non-Caucasian, being Indian or Chinese prisoners-of-war or Asian or Pacific civilians who were resident in or transported to territories occupied by Japan. However, as the trials reveal, many of these victims themselves are and will remain 'hidden', as their identities and numbers were often unknown.

This chapter examines the odd Australian statutory jurisdiction based on classes of victims that enabled some Asian victims of Japanese war crimes to be dealt with in the Australian war crimes trials, assesses their presence in the Rabaul trial series, and focuses on representations of Asians as witnesses in several notable trials held at Rabaul. Unlike the criticisms that have been made about the Tokyo Tribunal, the Rabaul trials cannot be criticized for seeking justice only for Caucasian victims of Japanese war crimes and for deliberately avoiding or otherwise neglecting the 'hidden history' of Asian victims. The question as to whether Asian victims received justice at the Australian trials, as perhaps implied by the title of this paper, however, is very complex and remains to be considered in depth.

[9] See Attorney-General's Department, 'Access to Historical Records' Press release (NAA: A1838 3103/10/13/12 Part 16A, 2 June 1975).

[10] Prott, 'Release of Records of Japanese War Crimes Trials' (NAA: A432, 1967/2152), 11.

(I) Jurisdiction over War Criminals

By the close of World War II, it was well established in international law that a belligerent was entitled to prosecute for war crimes those members of the armed forces of the enemy who fell into its hands, irrespective of the place where the crime was committed or of the victim's nationality, unless the belligerent was somehow prohibited from doing so by international law. There was not always broad agreement as to what wartime conduct was criminal under international law but, as Dr Willard B. Cowles, then a member of the United States' Judge Advocate General's Department, concluded in June 1945: '[I]t is clear that, under international law, every independent State has jurisdiction to punish war criminals in its custody regardless of the nationality of the victim, the time it entered the war, or the place where the offence was committed.'[11]

The Charter of the International Military Tribunal (for the Nuremberg Tribunal) and the Charter for the International Military Tribunal for the Far East not surprisingly thus defined their jurisdictions by reference to 'major war criminals of the European Axis'[12] and to 'Far Eastern war criminals'[13] respectively. The phraseology deliberately formalized some selectivity; since the war criminals had to be 'of the European Axis' and 'Far Eastern',[14] this effectively excluded the two Charters from being applied to war criminals within the Allied Forces themselves. Neither of the two Charters limited their jurisdiction by reference to the victims of war crimes, although victims impliedly had to have been within the European and the 'Far Eastern' war theatres.

Although the principle of universal jurisdiction of belligerents over war criminals was seemingly then recognized in Australia,[15] the legislation for Australia's own war crimes trials, the War Crimes Act 1945, deliberately circumscribed this jurisdiction by explicitly referencing the victims of war crimes. The bill for the Act was drafted with lightning speed by the Commonwealth Attorney-General's Department without

[11] Willard B. Cowles, 'Universality of Jurisdiction over War Crimes', *California Law Review*, *33* (1945), 218. Professor Hersch Lauterpacht described this as a rule which was 'well established as a matter of practice and which has behind it sound legal principle': Hersch Lauterpacht, 'The Law of Nations and Punishment of War Crimes', *British Yearbook of International Law*, *21* (1944), 68. See also Kenneth C. Randall, 'Universal Jurisdiction Under International Law', *Texas Law Review*, *66* (1988), 785–841.

[12] See Article 1 of the Charter of the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed in London on 8 August 1945, 82 UNTS 279.

[13] See Article 1 of the Charter of the International Military Tribunal for the Far East, signed in Tokyo on 19 January 1946, amended 26 April 1946, TIAS 1589, 4 Bevans 21.

[14] As Rashid Khalidi points out, the 'Far East' is 'one of many relics of an earlier, Eurocentric era, when things were "near" or "far" or in the "middle" in relation to the privileged vantage point of Europe': Rashid I. Khalidi, 'The Middle East as an Area in an Era of Globalisation', in Ali Mirsepassi, Amrita Basu, Frederick Weaver (eds), *Localising Knowledge in a Globalising World: Recasting the Area Studies Debate* (Syracuse, NY: Syracuse University Press, 2003), 171.

[15] See, for example, Fry's assertion that 'a belligerent's international competence to try and punish aliens charged with war crimes is unquestioned', in Thomas Penberthy Fry, 'The International and

much consultation[16] in late September 1945, was introduced into Parliament on 4 October 1945, passed both Houses without amendment within a few hours[17] and received royal assent on 11 October 1945.[18] The Act's jurisdictional provisions, sections 7 and 12, when read together, established three classes of victims of war crimes into which a victim of an alleged war crime must have fallen in order for an Australian Military Court to be convened:

> Section 7—A military court shall have power to try persons charged with war crimes committed, at any place whatsoever, whether within or beyond Australia, *against any person who was at any time resident in Australia*, and for that purpose, subject to any direction by the Governor-General, to sit at any place whatsoever, whether within or beyond Australia.
>
> . . .
>
> Section 12—The provisions of this Act shall apply in relation to war crimes committed, in any place whatsoever, whether within or beyond Australia *against British subjects or citizens of any powers allied or associated with His Majesty in any war*, in like manner as they apply in relation to war crimes committed against persons who were at any time resident in Australia.[19]

In short, to be dealt with by an Australian Military Court, while it was irrelevant where the alleged war crime had been committed, the war crime must have been committed against: (1) any person who was at any time resident in Australia; or (2) a British subject; or (3) a citizen of any power allied or associated with His Majesty in any war. These classes appear to demonstrate a claim to jurisdiction over certain war crimes based on an extension to the passive personality principle, as the jurisdiction accrued from the victims essentially being nationals (although that word was not expressly used in either quoted sections of the Act) of the co-belligerent Allied states, including Australia.[20]

The underlying criteria for the classes of victims noticeably, and rather awkwardly, changed across sections 7 and 12 of the Act from a victim's residency to allegiance to citizenship. The inelegance of this drafting was quickly acknowledged in practice; Maj K.R. Townley, acting as the Judge-Advocate in the Morotai M8 trial in December 1945, advised the Court that he thought that the categorization of classes

National Competence of Australian Parliaments to Legislate in Respect of Extra-Territorial Crime (Including War Crimes)', *University of Queensland, Faculty of Law Papers, 1* (1947), 33.

[16] Gen Thomas A. Blamey, the Commander-in-Chief of the Australian Army, for example, was quite unaware of the drafting of the War Crimes Bill and its passage, as he had drafted his own regulations to permit the trial of war criminals and presented it to his Minister on 3 October 1945: see the correspondence from Gen Blamey to Mr Frank M. Forde, Minister for the Army dated 3 October 1945; and between the Minister for the Army and Mr John A. Beasley, the Acting Attorney-General, dated 5 October 1945, in NAA: A472, W28681. Perhaps in return for the non-consultation, the Department of the Army drafted and presented regulations for the War Crimes Act 1945 to the Executive Council for approval without first submitting them to the Attorney-General's Department: see Department of the Army, 'Memorandum for the Secretary' October 1945 (NAA: A472, W28681).

[17] The sitting session of Parliament was forecast to end on 5 October 1945: see Department of External Affairs, 'Cablegram to Dr H.V. Evatt' 26 September 1945 (NAA: A472, W28681).

[18] Act No. 48 of 1945.

[19] Italics added for emphasis.

[20] Another feature that highlighted co-belligerent jurisdiction was section 5(4) of the War Crimes Act 1945 that empowered the Governor-General to appoint as a member (not as the president) of an Australian Military Court one or more officers of the armed forces of any allied or associated power.

of victims had been 'conceived in haste and born in confusion'.[21] The Court in that trial agreed, commenting that the draftsmanship on the issue seemed 'most inept'.[22] In fact, the overall drafting of the Act was viewed with some bemusement during the first trials convened at Morotai in late 1945. Lt Col L.J. Byrne, the prosecuting officer in the first ever trial, which began at Morotai on 29 November 1945, described the Act as an example of 'very curious and quaint methods of drafting'. In a rare moment of concurrence, the defending officer, Capt J.C. Brown, politely agreed, observing that the drafting was 'to say the least . . . most unusual'.[23]

The decision to predicate the jurisdiction of the War Crimes Act 1945 upon classes of victims was certainly deliberate, as the British Royal Warrant of 18 June 1945, upon which the Act was closely modelled, did not define its jurisdiction in relation to victims.[24] Regulation 4 of the Regulations for the Trial of War Criminals (UK) attached to the Royal Warrant simply provided that a person had to be located within the limits of command by an officer authorized to convene a Military Court and that it had to appear to the convening officer that the person had committed a war crime at any place within or without the limits of the officer's command.[25] Given the modelling of the War Crimes Bill, as it then was, on the Royal Warrant, it is not unsurprising, therefore, that one of the earliest drafts of section 7 of the Bill similarly said nothing at all about classes of victims but was worded simply as: 'A military court shall have power, whether within or outside Australia, to try persons charged with war crimes.'[26]

The insertion of classes of victims into the War Crimes Act 1945 was, however, not without precedent in the Australian war crimes context. Clear parallels exist between the jurisdictional provisions of the Act and the developing phraseology of the Instruments of Appointment of the various inquiries into war crimes commissioned in Australia in 1943, 1944 and 1945. Sir William Webb, upon his appointment as War Crimes Commissioner, was instructed on 23 June 1943, for

Such appointments occurred on several occasions during the Rabaul trial series but the appointments of Chinese National Army officers in cases involving Chinese prisoners-of-war were controversial, as sometimes those officers had been prisoners-of-war together with the prosecution witnesses, leading to defence claims that the Courts were not impartial. See, for example, the Rabaul R55 trial (NAA: A471, 80915).

21 See the Morotai M8 trial (NAA: A471, 80769). Townley later became the President of the Australian Military Courts at Manus Island, 1950–1.

22 Morotai M8 trial, above n 21.

23 Morotai M9 trial (NAA: A471, 80718).

24 Royal Warrant, Army Order No. 81, 18 June 1945. The War Crimes Regulations (Canada) (PC 5831/45), made by Order in Council on 30 August 1945, were also based on the Royal Warrant.

25 For an analysis of the British Royal Warrant, see United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, 1 (1947), 105–10. For an analysis of regulation 4, see Dr Egon Schwelb, legal officer to the United Nations War Crimes Commission, 'British Regulations for the Trial of War Criminals By Military Courts' 27 June 1945 (NAA: A472, W28681). For analysis of the war crimes trials held under the Royal Warrant, see A.P.V. Rogers, 'War Crimes Trials Under the Royal Warrant: British Practice 1945–1949', *International and Comparative Law Quarterly*, *39* (1990), 780–800.

26 See the Attorney-General's Department files developing the War Crimes Bill, with unidentifiable handwritten annotations (NAA: A2863, 1945/48). A similar draft of section 7 can be seen in an entirely handwritten draft of the War Crimes Bill (NAA: A472, W28681).

example, to enquire into '[w]hether there have been any atrocities or breaches of the rules of warfare on the part of members of the Japanese Armed Forces in or in the neighbourhood of the Territory of New Guinea or of the Territory of Papua'.[27]

These instructions were clearly targeted at those (expressly limited) persons who might have committed war crimes, not the victims of such crimes. The instructions for the second and third war crimes inquiries, however, demonstrated an increasing focus upon the victims of war crimes. Webb's remit was broadened for his second inquiry, when he was instructed on 8 June 1944 to enquire into 'whether there have been any war crimes on the part of individual members of the Armed Forces of the enemy against any persons who were resident in Australia prior to the present war, whether members of the Forces or not'.[28]

The instructions given to the Board of Inquiry into war crimes, also headed by Webb, on 3 September 1945, about a month prior to the passage of the War Crimes Bill, expanded the remit even further to embrace both British subjects and citizens of allied nations. The Board of Inquiry was instructed to enquire into:

> [w]hether any war crimes have been committed by any subjects of any State with which His Majesty has been engaged in war since the second day of September, [o]ne thousand nine hundred and thirty-nine, against any persons who were resident in Australia prior to the commencement of any such war whether members of the Defence Force or not, or against any British subject or against any citizen of an allied nation.[29]

The jurisdictional provisions of the War Crimes Act 1945 greatly resemble this final instruction, although the reference to 'whether members of the Defence Force or not' was dropped in section 7, while the third class of victims in section 12 was broadened to include any citizens of associated, not just allied, powers.

Given the lack of extant explanation for the wording of the jurisdictional provisions of the War Crimes Act 1945—which can probably be attributed to its swift drafting and the lack of significant consultation on the draft with other government departments or the Australian Army—it is difficult to determine precisely why the drafters deliberately chose to impose limits on the universal jurisdiction over war criminals and, having done so, then selected 'resident in Australia' as the criteria for section 7 of the Act, rather than the more normative birth, nationality or, perhaps, membership of the armed forces, as the wording of the second and third Webb appointments might have suggested. Caroline Pappas, one of the few researchers to have examined the processes and practices of the Australian war crimes trials, has suggested that the reason that classes of victims were explicitly referred to in the Act was to ensure that the expansive list of war crimes encompassed by the Act—which went beyond conventional war crimes—was not construed to cover victims who were enemy nationals, for example the Japanese themselves.[30] There is certainly some support for the conclusion that the Act's jurisdiction was designed

[27] NAA: AWM226, 5. [28] NAA: AWM226, 7. [29] NAA: AWM226, 8.

[30] Caroline Pappas, 'Law and Politics: Australia's War Crimes Trials in the Pacific, 1943–1961' (unpublished PhD thesis, University of New South Wales, 1998), 94.

to preclude Australians from being charged under it with war crimes against the Japanese or anyone else. A domestic analysis of the British Royal Warrant undertaken to consider the legislative 'action necessary' to institute war crimes trials by Australia had pointed out with some concern, for example, that the terms of the Royal Warrant and its regulations were 'completely general in their operation' and that nothing in them prevented proceedings against British subjects accused of war crimes.[31]

At the same time, however, the drafters of the War Crimes Act 1945 appeared to be faced with the problem of ensuring that however jurisdiction based on classes of victims was established, it was not too limited. If section 7 of the Act had been based on Australian birth, nationality or membership of the armed forces, many victims of war crimes committed in New Guinea or on Nauru Island, for example, might have had their cases slip through the prosecutorial gap. It appears as though residency in Australia was thus chosen as the criteria for section 7 of the Act specifically to ensure that trials could be convened in relation to certain Asian victims of war crimes, as they would be encompassed by being 'resident in Australia', although perhaps not by the other possible criteria. A number of Asian victims at the Rabaul trials in fact fell into the class of 'resident in Australia', as section 3 of the War Crimes Act 1945 defined 'Australia' as including the 'Territories of the Commonwealth' and section 4 extended the operation of the Act to 'every Territory of the Commonwealth'. When read together with the definition of territory in the Acts Interpretation Act 1901 (Commonwealth), this meant that inhabitants of New Guinea and Nauru, for example (the former a mandated territory of Australia and the latter a mandated territory of the British Empire but, under agreement between the United Kingdom, Australia and New Zealand, administered by Australia), were deemed to be resident in Australia for the purposes of the Act.

The use of the unusual phrase 'resident in Australia' in the Act proved somewhat confusing to Australian Army officers in the field faced with investigating war crimes and convening trials. The Australian First Army Headquarters, for example, posed several questions to Australian Headquarters (AHQ) in Melbourne throughout November and December 1945 in relation to whether certain persons—namely natives of mandated territories and, more specifically, Chinese civilians born in Rabaul before and after the mandate over New Guinea was granted in 1919—were to be considered as 'Australian nationals' for the purposes of the trials. The First Army was advised in each case that, for the purposes of the trials, natives of the mandated territories of New Guinea and Nauru were to be considered as 'Australian nationals', although the Chinese civilians in Rabaul must have 'resided there permanently' to be so considered.[32] The continued use by all correspondents of the phrase 'Australian nationals' when considering the Act appears to demonstrate how difficult

[31] See the undated, unattributed report entitled 'Royal Warrant and Regulations for the Trial of War Criminals: Action Necessary to Constitute Australian War Crimes Courts' (NAA: A472, W28681).

[32] See various messages from First Army to Landforces, 28 November 1945, 1 December 1945 and 20 December 1945; and responses from Landforces to Landops, First Army, 29 November 1945, 4 December 1945 and 21 December: (NAA: MP742/1, 336/1/382).

it was to come to grips with the concept of 'resident in Australia'. The AHQ's advice to the First Army was, however, partially incorrect: there was no requirement of duration of residency in Australia in the War Crimes Act 1945 nor in the Act's subsidiary Regulations for the Trial of War Criminals (Commonwealth)[33] and, indeed, it could be construed from the wording of sections 7 and 12 of the Act, both of which included the phrase 'at any time resident in Australia', that such residency did not have to be uninterrupted or even ongoing at the time when the war crime was committed.

In addition to being difficult to interpret, the criteria of 'resident in Australia' soon proved to be impracticable, especially during the Morotai trials in late 1945 to early 1946, during which the victims were predominantly Australian prisoners-of-war. Defending officer Capt Brown argued throughout the first Morotai trial, for example, that the prosecution had failed to establish that the unidentified prisoner-of-war described as the victim in the charge had been 'resident in Australia'. While a Japanese witness had given evidence that he had been told that one, possibly two, of the several airmen taken prisoner-of-war and executed together had been born in Melbourne and that all three had been stationed in Townsville, Capt Brown submitted to the Court that evidence of birth in Australia was not sufficient proof. Residency, in his mind, did not need to go so far as 'domicile'; that is, a permanent intention to take up accommodation at a certain place but it must be 'voluntary'. He argued that the airmen's stationing in Townsville, if that was indeed the case, did not prove their intention to 'reside' there. Maj Townley, acting as the Judge-Advocate, dealt with these submissions in his summing up by suggesting a fairly simple test for 'residence'. He considered that 'residence' did not imply 'any great degree of permanence' but it did imply 'something more than a mere transitory passage'. He advised that:

> [I]f a person were born in any particular country, you [the Court] may draw the inference from that fact alone, if there is no other evidence, that he comes within the class of person described in Section 7, i.e. a person at any time resident in that country.

He suggested, however, that if residency in Australia pursuant to section 7 could not be proven, then the Court then should proceed to consider whether the victim fell within the ambit of section 12; that is, whether the victim was a British subject or a citizen of any allied or associated power.

Eventually, the process of proving residency in Australia was made more efficient for prosecuting officers in mid-1946 by the addition of regulation 11A to the Regulations for the Trial of War Criminals.[34] The new regulation, the subject of which was described as 'urgent' by the Secretary of the Army when urging its approval,[35] read:

> In any proceedings of a military court, a document purporting to be a certificate under the hand of the prosecutor or prosecuting officer that a person referred to in the charge was

[33] Statutory Rule 164/1945, made under the War Crimes Act 1945 on 25 October 1945 and notified in the *Commonwealth of Australia Gazette* on 26 October 1945.

[34] Statutory Rule 56/1946.

[35] See Attorney-General's Department, 'Memorandum for the Secretary' undated but despatched 12 February 1946 (NAA: A472, W28681).

at some time resident in Australia shall be prima facie evidence of the matter so certified without proof of the handwriting of the prosecutor or prosecuting officer.[36]

As only one such certificate in the hand of the prosecuting officer was ever tendered,[37] it appears that the existence of the regulation in of itself effectively thwarted the defence in subsequent trials from pressing the issue of whether it had been proven beyond reasonable doubt that an (obviously Australian) victim was at any time 'resident in Australia'. The failure to tender such documents in other trials is very curious, especially as there were ongoing but unsuccessful defence submissions throughout the trials that, due to the more complicated international mandate over Nauru, residents of Nauru were not residents of a territory of Australia.[38]

If the broad intention behind the drafting of the jurisdiction provisions of the War Crimes Act 1945 based on classes of victims was to ensure that no trials could be convened in relation to war crimes committed against enemy nationals, however, it was ineffectual. A victim's residency in Australia by reason of being an inhabitant of a mandated territory seemed to override in a few cases other identification which would appear far more pertinent. Several trials regarding war crimes committed by Japanese against German and Austrian missionaries resident in New Guinea, for example, were held at Rabaul in early 1946. The defence in those cases submitted that the alleged victims were actually subjects or citizens of an Axis power allied with Japan and therefore did not fall within any class of victim established by the Act; however, these submissions were not accepted by the Australian Military Courts.

The victim in the Rabaul R6 trial, for example, was Father Henry Berger, a German Roman Catholic missionary who was assigned to Ramale Mission in New Britain.[39] Berger complained that he had been struck several times and threatened with death by Lt Abe Akihisa, an officer of the 17th Transport Regiment. At trial the prosecuting officer, Maj F.D. Green, submitted that these acts amounted to unlawful assault. At the end of the prosecution case, the defending officer, Maj I.A.H. Spain, submitted that Abe had no case to answer on the ground that the evidence did not support the charge of unlawful assault since the laws and usages of war only operated as between opposing belligerents or belligerents and neutrals. He pointed out that the complainant in this case was a German subject and Japan and Germany were allies at war. Opposing the application to dismiss the charge, Maj Green referred the Court to section 7 of the Act and advised that, by virtue of this section, the Act would apply

[36] Statutory Rule 56/1946 (20 March 1946).

[37] The certificate was tendered as an exhibit in relation to an unnamed Australian prisoner-of-war who was murdered in that, after being injured during an air raid, he was shot and his body thrown into the sea by the accused, who claimed that it was a mercy killing, see Hong Kong HK9 trial (NAA: A471, 81656). It is unclear why the certificate was tendered in this case, as there are many trials in which the name of the victim was unknown.

[38] Such submissions only arose, of course, when the particulars of the charge were worded somehow so as to imply that the Nauruans were residents of Australia. In the Rabaul R180 trial, the Nauruan victims were described as 'natives of Nauru displaced to Truk' and the prosecuting officer submitted that by virtue of section 12 of the War Crimes Act 1945, the Act applied to war crimes committed against British subjects in any place whatsoever and that the Court might take judicial notice of the fact that natives of Nauru were British subjects: see the Rabaul R180 trial (NAA: A471, 81208).

[39] Rabaul R6 trial (NAA: A471, 80744).

even to Japanese who had been resident in Australia. The Judge-Advocate, Capt F. Ackland, advised the Court that section 7 of the Act referred to 'any person who was at any time resident in Australia' and that the term 'Australia' included the territories. Capt Ackland pointed out that there was evidence, which had not been challenged, that the German missionary was resident in Australia. He further advised that a person resident in the King's dominions was entitled to protection of the King's peace, notwithstanding their nationality and, moreover, that temporary occupation by a hostile power did not alter this entitlement. On the rights of inhabitants, he referred the Court to para 383 of the Chapter XIV of the Australian edition of the *Manual of Military Law 1941*, which set out that:

> It is the duty of the occupant to see that the lives of inhabitants are respected, that their domestic peace and honour are not disturbed, that their religious convictions are not interfered with, and generally that duress, unlawful and criminal attacks on their persons, and felonious actions as regards their property, are just as punishable as in times of peace.

Unfortunately, the Judge-Advocate's description of New Britain as part of the King's dominions was, in this case, probably wrong. In the case of *Frost v Stevenson* in 1937, the High Court of Australia found that New Guinea, of which New Britain was a part, was not part of the dominions of the Crown. As Chief Justice Latham observed, '[t]he conclusion which I have thus reached is that New Guinea is a place out of His Majesty's dominions in which His Majesty has jurisdiction'.[40]

By late 1947, however, there seemed to have been a rethink as to whether it was proper to try Japanese for war crimes committed against subjects or citizens of its own allies. In the Hong Kong HK1 trial, for example, the prosecuting officer, Maj A.D. Mackay, advised the Court that while it would become apparent from the evidence that 'a number of other internees' had been massacred alongside twenty-three Australian civilian internees on New Ireland in 1944, the killing of those other internees formed 'no part of the case against the accused' and the Court was to entirely disregard that evidence. He found it 'ironical to note that such other persons were all of German nationality and supposedly the Allies of the Japanese'.[41]

That the Australian trials should encompass victims of war crimes who were not, by birth or nationality or even residency, 'Australian', however, was not natural and inevitable to some critics. The Minister for Post-War Reconstruction, John Dedman, questioned (somewhat outside the remit of his portfolio) in August 1946, for example, as to why Australia had been 'placed in the position' of having to try Japanese for war crimes committed against Indian and Chinese nationals,[42] though he did not explain why he apparently considered it an unnecessary burden. Brig A.W. Wardell, then acting Adjutant-General of the Army, which was running the trials, drafted the response that:

> A war crime is an offence against the law of nations and it behoves any nation to punish proved breaches against such law, whether committed against its own nationals or those of

[40] [1937] HCA 41; (1937) 58 CLR 528. [41] Hong Kong HK1 trial (NAA: A471, 81645).

[42] Dedman presumably did not know that some Japanese had also been tried for offences against Axis nationals.

another country. This is particularly so where the nationals of another country are resident in the territory of the Commonwealth, or if they are in that territory when the crime was committed.[43]

In short, Wardell was expressing his conviction that the identity of a victim of a war crime was, in fact, largely irrelevant, as it was the duty of every nation to punish war criminals in order to uphold the law of nations. In addition to apparently asserting the universality principle, however, Wardell's response also suggested a reliance—not on the passive personality principle as might have been expected from the Act's use of classes of victims—but on the territorial principle; that is, jurisdiction necessarily arose because the victims of the war crimes were resident in the territory of the Commonwealth of Australia (not just in Australia itself) or were within that territory when the war crime was committed. That a significant proportion of those victims whose cases were dealt with at Rabaul happened to be Asian was perhaps inevitable; it was a simple consequence of the Japanese armed forces' transportation of enormous numbers of Indian and Chinese civilians and prisoners-of-war to New Guinea and other places in South East Asia and the commission of acts amounting to war crimes against them and the inhabitants of those places. As these places were either a part of Australian territory or fell within Australia's zone of control in the immediate post-war period, many suspected war criminals fell into Australian custody at the end of the war which 'behoved', as Wardell had put it, Australia to convene war crimes trials against them given sufficient evidence to do so.

(II) Numbers and Nature of Asian Victims at the Rabaul Trials

It is a sad measure of the nature and extent of Japanese war crimes committed in the Pacific theatre of World War II that the total number of Asian victims whose cases were eventually dealt with at the Rabaul trials cannot be quantified. Due to a lack of evidence, many of the charges at the trials could only describe the victims as 'unknown' and their quantity as 'a number'. In this manner, for example, the massacres of the population of Ocean Island were described in the charges in the Rabaul R51, R52, R53, R68 and R70 trials as the murder of 'persons unknown', a linguistic shorthand that completely understates their extent and significance. Regrettably, the identification and quantification of Asian victims is further hindered by the fact that there was little attempt (even at the Rabaul trials where the greatest number of trials were held) to regularize the particulars of charges, as can be seen by the various examples below:

- Murder, in that they on Ocean Island on or about 20 August 1945 murdered persons unknown (Rabaul R53 trial);

[43] Brig A.W. Wardell, Acting Adjutant-General, 'Minute Paper on War Crimes Trials for Secretary, Department of the Army' 20 October 1946 (NAA: MP742/1, 336/1/980).

- Torturing civilians, in that he at Ramale on or about 10 February 1945 tortured Sister Mektil, Sister Cecilia (both civilians) and other civilians (Rabaul R7 trial);
- Murder, in that they at Teninbaubau, Bougainville on or about 23 January 1945 murdered twelve Indians (Rabaul R90 trial);
- Murder, in that he at New Guinea in or about January 1945 murdered Hav Mehr Din (Rabaul R96 trial);
- Ill-treatment of a prisoner-of-war in that he at Mango about 3 March May 1945 ill-treated WO Hor Chin Chun, a prisoner-of-war (Rabaul R118 trial);
- Murder in that they at New Ireland in or about 1944–5 murdered a number of Chinese civilians, half-caste civilians and natives (Rabaul R127 trial).

Moreover, the issue of jurisdiction was only rarely directly addressed in the charges; that is, the particulars of charges never included a reference into which class a victim fell in the sense of 'resident in Australia', 'British subject' or 'citizen of an allied or associated power'. Rather, those who drafted the charges usually concerned themselves only with whether the victim was a prisoner-of-war or a civilian, although if the nationality of the victim was known, it was often appended, as shown in the examples above. A defence objection to the drafting of a charge in the basis that it lacked particularity by not alleging that an unidentified victim fell into one of the classes of victims established by sections 7 and 12 of the War Crimes Act 1945 was overruled in the very first trial at Morotai, mentioned above, and was never, as far as this author knows, raised again.

In addition to distinguishing between prisoners-of-war and civilians, the trials also explicitly distinguished between 'civilians' and 'natives', a false distinction but one characteristic of this period. The trials consistently used the term 'native' both as a noun and an adjective and, of course, this has long since been unpacked as imperialistic, colonialist and racist.[44] Most of those involved with the trials only perceived 'natives' as a kind of amorphous group, an inevitable (to them) demarcation based on physical appearance, living standards, language and education. As the Australian Military Courts were far less inquisitive about factual details than modern courts today, unless a witness, affiant or declarant in evidence happened, as an aside, to state where a 'native' victim was from, contemporary readers of the trials have no idea of the actual ethnic background, family or tribal affiliation or claim to nationality of many victims. The location of the war crime cannot be used as an accurate guide to the origins of victims, as the Japanese armed forces routinely shipped civilian inhabitants of occupied territories all over the Asia Pacific, either as labourers or simply to transfer population groups. The sole survivor to give evidence at the trials relating to the Ocean Island massacres, for example, was one Kabunare, a 'native' from Nikunau Island, one of the Gilbert Islands, then a British colony.

[44] For a discussion of the implications of the term 'native', see, for example, Bill Ashcroft, Gareth Griffiths and Helen Tiffin (eds), *Post-Colonial Studies: The Key Concepts* (London: Routledge, 2000), 158. See also Arjun Appadurai, 'Putting Hierarchy in Its Place', *Cultural Anthropology*, *3* (1988), 36–49.

While in many cases the specific nationality or ethnicity of native victims were not particularized in the charges, the general identity of most other victims can usually be surmised from a reading of the evidence, which begs the question as to why those who drafted the charges were not more specific and consistent in their approach. From the extent to which victim identification is possible from the records of the 190 trials held at Rabaul, Figure 17.1 shows a rough statistical overview of the types of victims. As charges often encompassed multiple victims or trials were convened upon multiple charges, the same trial could include several types of victims. In the Rabaul R173 trial of Lt Gen Adachi Hatazō, for example, the single charge against him, based on the principle of command responsibility, alleged the commission of 'brutal atrocities and other high crimes against the people of the Commonwealth of Australia and its allies' in New Guinea.[45] The prosecution evidence, however, described war crimes committed by Adachi's subordinates

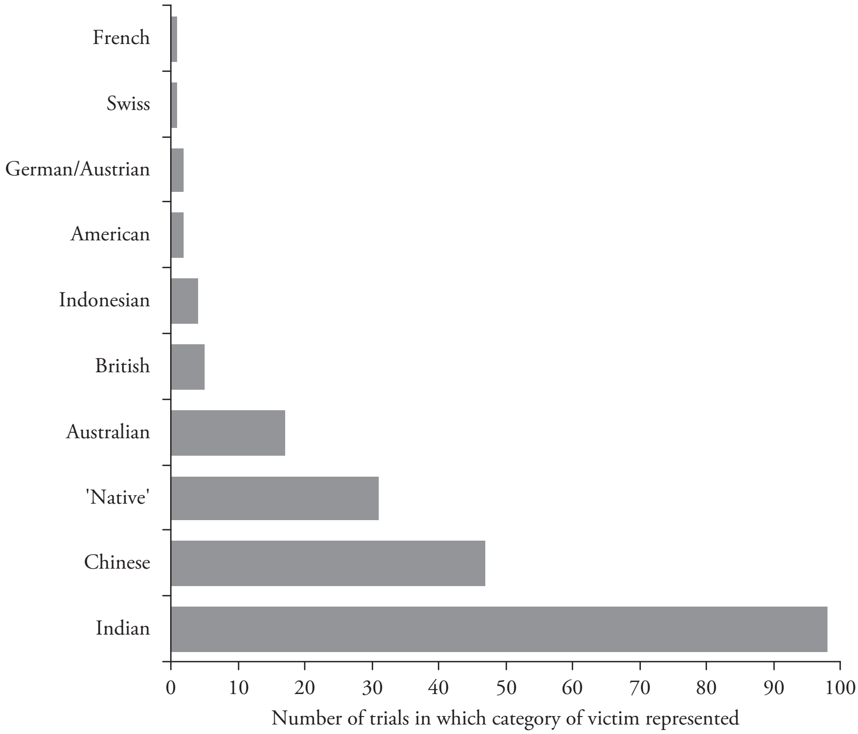


Figure 17.1 Categories of victims represented in the Australian Military Court war crimes trials at Rabaul.

[45] NAA: A471, 81652.

against Chinese civilians, 'natives', Indian and Australian prisoners-of-war and Australian and American soldiers. The Rabaul R173 trial, therefore, is represented in each of the Chinese, 'native', Indian, Australian, and American categories.

This statistical breakdown overwhelmingly demonstrates that the majority of victims whose cases were dealt with during the Rabaul trials were of Asian or Pacific origin. For example, Indian, Chinese and 'natives' were represented amongst the victims in 176 of the 190 trials overall at Rabaul. By contrast, Australian victims were represented in only seventeen of the trials and British and American victims in only five and two trials respectively. Whatever criticisms might be made about the Tokyo Tribunal or the Australian war crimes trials held in other locations, the Rabaul trial series was not, by far, a story about justice for only Australian or Caucasian victims of war crimes.

(III) Attitudes towards Asian Witnesses at the Rabaul trials

That there was an Asian presence, indeed a certain Asian precedence, in the Rabaul trials does not mean that Asian witnesses, affiants or declarants who gave evidence of war crimes against their comrades, neighbours, family or themselves were viewed in an exemplary light, though to what extent attacks on their competency, credibility and veracity arose from prevalent colonial or racist attitudes of the time or were simply a defence tactic to weaken and destabilize prosecution cases is difficult to gauge. It was certainly a standard defence practice at many trials to submit that the prosecution evidence had been exaggerated or fabricated by victims and prosecution witnesses for a variety of reasons, including to take revenge upon the Japanese or to ingratiate themselves with Australian authorities in hope of personal benefit or to avoid being tried for a crime themselves. Lt Gen Adachi defended himself, and by implication his subordinates, in his trial by asserting, for example, that it was 'not infrequent that the Indians after their recovery tried to conceal their treason against England and to falsify their position by reporting against the Japanese, maliciously fabricating or exaggerating incidents'.[46]

According to Phipson's *The Law of Evidence*, the eighth edition of 1942, which was the principal text on evidence that was cited in the Australian Military Courts, all witnesses were, in general, to be considered as competent, including 'believers of all creeds'.[47] Witnesses were, of course, permitted to be questioned as to their

[46] NAA: A471, 81652, Part 1. In trials at Rabaul concerning Indian prisoners-of-war, the principle defence was that the Indians were not prisoners-of-war subject to the protection of international law but that, in seeking the independence of India from Britain, they had been released on parole from the status of prisoners-of-war to become of their own free will either members of the Indian National Army, which was collaborating with the Japanese Forces, or volunteer labourers for the Japanese Forces. The Japanese claimed that it was only after the cessation of hostilities that the Indians asserted that they were prisoners-of-war and had been forcibly made to join the Indian National Army or to serve as labourers.

[47] Sidney Lovell Phipson, *The Law of Evidence*, (London: Sweet & Maxwell, 8th edn, 1942), 443.

credibility and their general reputation for veracity.[48] It is noticeable, however, that Phipson did not extend the warnings about, for example, the danger of convicting on uncorroborated testimony of accomplices[49] or the requirement that the testimony of 'infants, lunatics and drunkards' be 'received with caution'[50] to witnesses of a certain nationality or ethnic type, such as Chinese, Indian or 'native' witnesses. In fact, the only occasions on which Phipson concerned itself regarding the evidence of such witnesses was in regard to various oaths, affirmations and declarations which could be used in relation to them.[51] Nevertheless, there appeared to be a minor undercurrent of feeling in the trials that the evidence of Asian witnesses, including Japanese witnesses, although admissible, ought to be considered and weighed differently to the evidence of non-Asian witnesses. Some defence submissions, which appear from their literacy to have been made by Australian defending officers and not Japanese defending officers or civilian defence counsel, openly attributed negative tendencies to Asian witnesses along racial and ethnic lines. Moreover, these defence attacks were usually made in closing addresses to which no response by the witness was possible, even if he or she was present.[52]

As an example of the defence attacks on Asian witnesses, Chinese witnesses were said to have the 'habit' of revenge and the 'disposition' to exaggerate even 'matter[s] of no account',[53] which they did out of malice or because simply exaggeration was 'common' to those 'unlearned coolies'.[54] Indian witnesses were similarly alleged to have exaggerated out of their desire for revenge against the Japanese. Capt J.H. Watson, who appeared as the defending officer in many trials at Rabaul, suggested in no less than six separate trials that the prosecution evidence had been produced out of the 'notorious' 'characteristic imagination' or 'characteristic exaggeration' of Indian witnesses.[55] In the Rabaul R71 trial Capt Watson submitted, for instance, that it was 'possible for the Indians, who certainly would not lack motive, to distort simple facts having regard to their notorious capacity for exaggeration'.[56]

Similar critical comments were made regarding the veracity and credibility of the evidence of 'native' witnesses, particularly that the 'shortness of memory' of 'natives' was 'well known'[57] or that they were 'prone to exaggeration'.[58] That the Japanese accused occasionally held similar beliefs about the 'native' witnesses is clear. The two Japanese convicted in the Rabaul R21 trial submitted in their petition, for example, that

[48] Lovell Phipson, above n 46, 180, 469–74. [49] Lovell Phipson, above n 46, 477–9.

[50] Lovell Phipson, above n 46, 445. [51] Lovell Phipson, above n 46, 452–4.

[52] Most witnesses were not present, since the permissive rule of evidence set down in section 9(1) of the War Crimes Act 1945 meant that the Court might consider 'any document appearing on the face of it to be authentic, provided the . . . document appears to the court to be of assistance in proving or disproving the charge, notwithstanding that the . . . document would not be admissible in evidence before a field general court martial'. That this section had the effect in practice of depriving the accused of the right to cross-examine the witnesses against him was a common defence complaint.

[53] See the petition in Rabaul R81 trial (NAA: A471, 80987).

[54] See the defending officer's closing address in the Rabaul R114 trial (NAA: A471, 81020).

[55] See the defending officer's closing addresses in the Rabaul R20, R23, R29, R71, R117 and R130 trials (NAA: A471, 80729, 80725, 80736, 80984, 81023 and 81057).

[56] See the defending officer's closing address in the Rabaul R71 trial (NAA: A471, 80984).

[57] See the defending officer's closing address in the Rabaul R13 trial (NAA: A471, 80737).

[58] See the defending officer's closing address in the Rabaul R21 trial (NAA: A471, 80730).

it was a 'well-known fact' that natives would 'unashamedly' tell lies, disregarding 'morality and humanity', as they were 'slaves of going by nature'.[59] In defending his witnesses in this case, Capt J.D. Steed, the prosecuting officer, admitted that 'natives' tended to 'confuse fact with hearsay'. He suggested, however, that if the 'frills' of their testimony were removed, a 'solid core' of reliable evidence still remained.

Unlike such critical views of the evidence of Chinese and Indian witnesses, the views regarding the evidence of 'native' witnesses seemed to receive a bit of an official imprimatur in a few trials at Rabaul. Capt F.D. Green, acting as the Judge-Advocate in the Rabaul R9 trial, instructed the Court, for example, that:

> You have formed your opinion of the native Witnesses, and I think you can take notice of the fact that it is very difficult indeed for the Prosecution to get a consecutive story from native Witnesses. There have been many discrepancies. Such discrepancies in fact that if they appeared in the case for the Prosecution with white Witnesses would undoubtedly rule the Prosecution completely out of having made a [p]rima facie case. I suggest to you that the fact that there are discrepancies in the evidence of the native Witnesses does not lead the Court to an inescapable conclusion that these Witnesses or any of them are lying. In this respect natives are very like children. They have vivid imaginations, and their evidence must be very carefully scrutinised.[60]

Similarly, Maj I.A.H. Spain, acting as Judge-Advocate in the Rabaul R10 trial, observed to the Court that the prosecution evidence had been wholly heard from 'natives'. As such, he warned the Court that it was dangerous to convict upon the evidence of 'natives' who 'like young children are an unreliable class of witness without some corroboration'.[61]

It is difficult to ascertain, at this late stage, whether the views expressed, in particular about the evidence of native witnesses, stemmed from the speaker or writer's own beliefs or were simply representative of a more widespread viewpoint. Certainly, these sorts of observations about 'native' evidence were not too dissimilar from how Aboriginal witnesses were then viewed in mainstream Australian courts. As one anthropologist, A.P. Elkin, observed in 1947 when considering the 'unsatisfactory features of native evidence', Aboriginal witnesses were 'apt to be labelled "liars" ' due to contradictions in their statements made at different times or when they were questioned in cross-examination.[62] In fact, he thought that Aboriginal witnesses appeared to say 'whatever will get them out of the strange magic-ridden room as quickly as possible'.[63] Elkin concluded that the evidence of Aborigines in court was, for a complexity of reasons, 'unreliable', and 'almost inevitably so', and that the 'actual court scene' was 'apt to be ludicrous and futile'.[64] He stressed, however, that it was 'not lack of intelligence on the part of the Aborigines' which made them unreliable witnesses, it was the application of:

> selected (that is, legal) mechanisms of one culture to persons 'schooled' in another culture which provides very different mechanisms for dealing with similar situations... [and that

[59] See the defending officer's closing address in the Rabaul R21 trial (NAA: A471, 80730).
[60] See the Judge-Advocate's summing up in the Rabaul R9 trial (NAA: A471, 80742).
[61] See the Judge-Advocate's summing up in the Rabaul R10 trial (NAA: A471, 80740).
[62] A.P. Elkin, 'Aboriginal Evidence and Justice in North Australia', *Oceania*, *17* (1947), 182.
[63] Elkin, above n 61, 183. [64] Elkin, above n 61,184.

this was done] without the medium of a thoroughly understood common language, and without expert assistance in understanding the native cultural background.[65]

The same observations could be drawn about the Australian Military Courts. Many of the Asian witnesses who appeared before the Courts were unlikely to have been familiar with an adversarial legal system, let alone with the adapted structure and procedures of the field general court-martial system generally used in the trials. Moreover, there was no common language—while English was the principal language of the Courts, Japanese, Mandarin, Cantonese and pidgin (Tok Pisin) were also used.[66] There is no evidence whatsoever that the members of the Courts, most of whom were not legally trained, received any guidance on understanding the cultural background of the witnesses whose demeanour they were asked to assess. As Nancy Armoury Coombs points out in her 2010 study of the evidentiary foundations of international criminal convictions, factors such as these can function as impediments to the accurate provision of evidence by witnesses and, consequently, due fact-finding by courts.[67]

The attacks on Asian witnesses during the Rabaul trials were very significant because, in most cases involving Asian victims, the oral or written record of oral evidence of Asian eye-witnesses to the war crimes formed the bulk, if not all, of the prosecution cases. In contrast to the position at the International Military Tribunal at Nuremberg, there were few, if any Japanese documentary records of war crimes committed in occupied areas that could be tendered in evidence.[68] Such documents, if they existed at all (which was increasingly unlikely by 1944–5, given the wide dispersal of units from various command headquarters in South East Asia and the tendency to give oral orders which were carried out immediately), were usually destroyed in response to official orders to dispose of records regarding military matters at the time of the surrender.[69] For example, the Japanese armies in locations including Borneo, Malaya and Java were instructed on 20 August 1945 that not only were personnel who had mistreated prisoners-of-war or civilian internees permitted to immediately flee the area but that 'documents which would be unfavourable for us in the hands of the enemy are to be treated in the same way as secret documents and destroyed when finished with'.[70] If the members of the Australian

[65] Elkin, above n 61, 187.

[66] The few Indian witnesses who appeared in person tended to use English on the stand. The written statements of Indian witnesses that were tendered in evidence were, however, translated from languages such as Urdu.

[67] Nancy Armoury Coombs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (New York: Cambridge University Press, 2010).

[68] As Nancy Armoury Coombs observes, the 'high-level Nazi officials who were prosecuted at the Nuremberg Tribunal were convicted on the strength of their own documentation': Coombs, 11.

[69] This instruction was itself, however, tendered at the Tokyo Tribunal: Totani, above n 3, 105–7. See also Edward Drea, 'Introduction' in Edward Drea et al, *Researching Japanese War Crimes: Introductory Essays*, National Archives and Records Administration for the Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group, 2006, <http://www.archives.gov/iwg/japanese-war-crimes/introductory-essays.pdf> (accessed 3 March 2013), 9–10.

[70] Quoted in Totani, above n 3, 106.

Military Courts were thus convinced by the defence to place a lesser weight on or to disregard evidence from those Asian eye-witnesses, then the accused was more likely to be found not guilty.

Given the lack of written judgments by the Australian Military Courts and thus remarks on the evidence or demeanour of specific witnesses or facts found to be proven, it is impossible to determine to what extent negative submissions about Asian witnesses had an impact on the Courts and affected their consideration of the weight to be given to their evidence. The rate of conviction at Rabaul, however, perhaps suggests that the Courts found such arguments generally unconvincing. Of 390 accused tried at Rabaul (some of these being the same persons appearing in multiple trials), 266 were convicted and 124 were acquitted, amounting to a conviction rate of 68.2 per cent.[71] This figure was, in fact, slightly higher than the overall conviction rate from the Australian war crimes trials, which was 67.64 per cent.[72]

Although there was an overwhelming Asian presence at the Rabaul series of the Australian war crimes trials, it is certainly probable that the number of trials merely scratched the surface of the war crimes that were committed. That justice was selective in that sense is regrettable; however, as the distinguished British jurist Lord Wright of Durley, the Chairman of the United Nations War Crimes Commission, observed in 1948: 'The majority of war criminals will find safety in their numbers. It is physically impossible to punish more than a fraction. All that can be done is to make examples'.[73]

That some trial personnel felt it necessary to attempt to discredit Asian witnesses on the basis of their race or ethnicity, well beyond what was usually permitted in attacking veracity, is disappointing, though perhaps not surprising for the period. No doubt, though, if there was a wider knowledge of the Australian war crimes trials, some of the most prevalent criticisms of the various international and domestic war crimes trials of the Japanese—that they did not adequately deal with war crimes committed against Asian victims—would be far less sustainable.

[71] See the chart of statistics in David C.S. Sissons, 'The Australian War Crimes Trials and Investigations (1942–51)', <http://www.ocf.berkeley.edu/~changmin/documents/Sissons%20Final%20War%20Crimes%20Text%2018-3-06.pdf>. According to a similar chart compiled by Michael Carrel, the number of accused tried at Rabaul was 392: Michael Carrel, 'Australia's Prosecution of Japanese War Criminals: Stimuli and Constraints', unpublished PhD thesis (The University of Melbourne, 2005), 100. My own count is that 392 accused were tried at Rabaul but, if the multiple trials of the same persons are discounted, the total number of individual persons tried was 330.

[72] Carrel, above n 70, 102.

[73] United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: H.M. Stationery Office, 1948), 22.

18

Dirty War Crimes: Jurisdictions of Memory and International Criminal Law

*Peter D. Rush**

> It would be a mistake to expect that trials for past human rights crimes will settle disputes about the historical interpretation of recent events. History cannot be 'settled' in this sense…[1]

> What matters is not the fact that we remember history, but the way in which we remember it.[2]

> Although it must be justice that has the final word, we cannot remain silent in the face of all that we have heard, read and recorded.[3]

(I) Leave-taking

Decisions are constitutive of transitions and their dealing with the past. Whether the move is to move on from war or social conflict, from crime or atrocity, the conduct and norms of law give shape to their formation and transformation. This chapter engages the two didactic orientations of international criminal justice that, for better or worse, have come to coordinate the juristic presentation of that conduct, those norms—namely, the prosecutorial and the testimonial. Staying with law and its forms, it addresses the intimacies of a legal case history.

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[1] Juan E. Mendez, 'Latin American Experiences of Accountability' in Ifi Amadiume and Abdullah An-Na'im (eds), *The Politics of Memory: Truth, Healing and Social Justice* (London: Zed Books, 2000), 137.

[2] K. Asmal, L. Asmal, R.S. Roberts, *Reconciliation Through Truth: A Reckoning with Apartheid's Criminal Governance* (Glosderry: David Philip Publishers, with Mayibue, University of the Western Cape, 1996), 26.

[3] Ernesto Sabato (1984), Prologue to *Nunca* Más:*The Report of the National Commission on the Disappearance of Persons* (or CONADEP) [website], <http://www.desaparecidos.org/nuncamas/web/english/library/nevagain/nevagain_002.htm> (accessed 31 October 2011).

The first part reconstructs the narrative memory and socio-legal context of the contemporary scene of memory in Argentina concerning *La Guerra Sucia* ('The Dirty War') and *los desaparecidos* (literally 'the disappeared', but often rendered as 'the missing').Throughout, these terms remain in Spanish so that they may resound with all the pain, suffering and injustice that they carry to this day. The second part turns to an engagement with a recent film—*El secreto de sus ojos* (The Secret in Their Eyes)—set in Buenos Aires and is concerned with writing the life of the law in the aftermath of atrocity. This will have returned the account of Argentina's memory work to the conduct of criminal jurisdiction. After reconstructing two ways to live a life full of nothing, a life lived with the trauma of a legal case history, the coda to the chapter addresses itself to the remnants of a criminal jurisdiction of memory. If decisions are constitutive of international criminal justice in times of transition, then a memorial jurisdiction of crime and atrocity can be thought in terms of its manner of speaking: its genres of representation, as much as its taxonomies. An ethics of testimony and a logic of memory remain unsettled in the aftermath of mass atrocity. Perhaps it is now possible to say *that* is a legacy that international criminal justice receives from Argentina.

(II) Sad Privilege of Argentina

Argentina is a community assailed by unassimilable experiences of injustice and suffering that return in parts and images. It is a country possessed by *La Guerra Suica* that took place from 1976 to 1983. On 24 March 1976, a military junta presided over by Jorge Videla took power from Isabel Perón in a coup d'etat. Five years later, Videla handed over the presidency of the junta to General Viola. Two years later, with the loss of the Malvinas war generating intense domestic problems, a transitional military government took power and prepared general elections. Raul Alfonsin, from the Unión Civica Radical party, campaigned on a platform that promised a national truth commission and a national accounting of what happened.

From the outset, the military junta with Videla as its leader initiated a programme of disappearing leftist guerrillas in an effort to cleanse and strengthen what was characterized as a weak and feminized social body.[4] There was a quite specific focus on the student movement. The programme soon extended into a systematic and generalized disappearing of the left. This is *La Guerra Sucia*. The national truth commission (CONADEP), which was set up when Raul Alfonsin was democratically elected as President, documented some 8,960 deaths and disappearances between 1975 and 1983, with most taking place in the first year of the junta led by Videla. Counting practices have varied and most estimates of *los desaparecidos*

[4] For an excellent reconstruction of the dirty war in terms of the gendered construction of subjectivity, authority, the state and resistance—as well as the 'twice performed behaviours' of the Madres, see Dianne Taylor, *Disappearing Acts* (Durham, NC: Duke University Press, 1997), particularly Chapter 7.

now put the count between 10,000 and 30,000 people. Disappearance was the preferred method of the junta. As Ernesto Sabato put it, emphasizing the material, visceral and aesthetic conduct of the junta, 'in the name of national security, thousands upon thousands of human beings, usually young adults or even adolescents, fell into the sinister, ghostly category of the *desaparecidos*, a word (sad privilege for Argentina) frequently left in Spanish by the world's press'.[5]

The response has been memory politics. *La Guerra Sucia* and its *desaparecidos* will have haunted Argentine politics. In part, the response has been a matter of recovering the untold stories, the hidden histories, so that the narrative of the past can recount what was done, where it was done and how, by whom and to whom. In the national accounting that followed the end of the military dictatorship, information was at a premium, especially since the criminal apparatus of power was carried out within a double ordering: one normal, open and official that targeted ordinary criminality; the other abnormal, operating under a de facto power and clandestine that targeted 'subversives'.[6] Nevertheless, the lineaments of the story of the dirty war were well-known from quite early on.[7] This is not to downplay the importance of determining the precise and specific facts of particular incidents. In fact, the investigations and files generated by CONADEP, for example, have provided the evidential basis for numerous criminal proceedings beginning with *El Juicio a las Juntas* in 1985. Similarly, its report has been continuously in print for some thirty years and is now in its fifth edition, as well as having an online and translated presence. In short, the narrative of the past is presented in the mode of a repetition and reminder of what is already known. The clandestine nature of the dirty war, like the *Nunca Más* report itself, and the word *desaparecidos*, has something of a talismanic quality. In this it assists the audience of the story—those addressed by the narrative memory of the past, whether personal or communal—to recognize themselves in it. It reminds them of what they already knew and hence forms a personal and collective self-understanding. And such recognition and reminders are an achievement in the context of a dirty war and its aftermath.

[5] Sabato, above n 3. This chapter will not recount the details of the dirty war. The Nunca Más report provides much. For scholarly elaboration that has assisted with my understanding, see Mario Di Paolantonio, 'Tracking the Transitional Demand for Legal Recall: The Foreclosing and Promise of Law in Argentina,' *Social & Legal Studies*, *13* (2004), 351–75; Taylor, *Disappearing Acts*, above n 4; Antonius C.G.M. Robben, 'How Traumatised Societies Remember: The Aftermath of Argentina's Dirty War,' *Cultural Critique*, *59* (2005), 120–64; Mark J. Osiel, 'Ever Again: Legal Remembrance of Administrative Massacre,' *University of Pennsylvania Law Review*, *144* (1995), 463–704; Mark J. Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick, NJ: Transaction Publishers, 1997).

[6] This is a common topos. It was initiated in the immediate aftermath of the military dictatorship in the report of the national truth commission and in the judgment of the court in *El Juicio a las Juntas*. For a recent example, see the Córdoba judgment in the *Videla* case of 22 December 2010, at 28. Available at <http://www.eldiariodeljuicio.com.ar/> ('22/12 Sentencia Descargá la sentencia completa').

[7] This is not uncommon in transitional justice contexts. Priscilla B. Hayner, 'Fifteen Truth Commissions—1974–94: A Comparative Study' in N. Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Vol. 1, (Washington DC: United States Institute of Peace Press, 1995), 228 (commenting that 'while not true in every case, a general understanding of who did what during a period of violence is usually well accepted by the civilian population within a country').

All of which is to say that the telling of the story of the past, its enunciation rather than its statement, is important for understanding projects based on narrative memory. Here, rather than a demand for information and a recounting of the facts, what comes into view is the demand to 'send a message', an attachment to a larger normative story—whether it be about the dirty war, whether it be about the global rule of law or the complicity of the judiciary in the dirty war, or whether it is about the character of the nation.

What I have been tracking so far is the way in which contemporary memory politics of Argentina are precisely a politics of memory. Information becomes meaningful and has value by way of a normative narrative—and this is so simply because the narrative memory of the past is a way of dealing with the past which implicates and is *addressed to others*. In this sense, then, it is a way of forming a world in which the narrators can appear to themselves and others. Memory politics are always already public and historical. Yet the pressure of the normative is one that pushes the story of *La Guerra Sucia* and its aftermath towards an insistence on breaking with the past, as much as setting right standards for the future and moving on. As Ruti G. Teitel astutely notes in her genealogy of transitional justice, 'the paradoxical goal is to undo history' and so the threshold challenge of transitions is one of 'remaining in history'.[8] This has both populist-democratic as well as populist-authoritarian orientations. Where 'moving on' might be the implicit norm associated with liberal rule of law narratives, consider the explicit invocation of a break with the past by Aldo Rico—a former lieutenant colonel who served in the Malvinas War during the military junta. In 2007, as prosecutions of the military for dirty war crimes get up a head of steam under the Kirchner administration, he argues that it is 'counter-productive to return to the past'.

Despite the prevalence of a normative politics of memory, it remains possible to frame the question of dealing with the past in terms of an ethics of memory. Here, dealing with the past is conducted in the mode of *acknowledgement*. What is also at stake is not so much information as understanding. Narrating the past, recalling it, remembering it, is also a demand that *others* recognize the criminality, the injury, the injustice, pain, suffering and death—the disappearances, the tortures, the abductions, the kidnapping of children, 'the stolen identities', the murders. In such projects of memory—whether art installations, human rights advocacy, protests staged by the Madres de Plaza de Mayo especially in the early years, the sites of conscience projects[9]—the demand for information and for an end to impunity ('never again') not only instantiates a break with the past, a normative pressure to

[8] Ruti G. Teitel, 'Transitional Justice Genealogy,' *Harvard Human Rights Journal*, *16* (2003), 86–87. See also Ruti G. Teitel, 'Transitional Jurisprudence: The Role of Law in Political Transformation', *Yale Law Journal*, *106* (1997), 2009–2080; Ruti G. Teitel, *Transitional Justice*, (Oxford and New York, NY: Oxford University Press, 2002).

[9] *International Coalition of Sites of Conscience* [website], <http://www.sitesofconscience.org/> (accessed 24 February 2013). See also Memoria Abierta, a coalition of human rights organizations tasked with the archiving of the memory of abuses that occurred under the juntas. In December 2010, it launched 'Vestigios', an online memorial displaying photos of objects that survivors and relatives of victims kept in memory of their loved ones. Available at <http://www.memoriaabierta.org.ar> (accessed 24 February 2013).

move on, but also foregrounds an ambivalence. It is as if the acknowledgment of the past is caught between the burden of history and the presumption of a future. In this engagement with *La Guerra Sucia*, such an ethics of memory appears not so much as a counter-narrative but as a hyperbolic, overheated acknowledgment of the injustice of pain, suffering and death. Bearing witness is viscerally conducted as a life lived with the past.

The disputes to which memory politics give rise are mediated by history and by visceral notions of personal and collective responsibility. In doing so, they force a reflection on the past and on the social context in which the response to the past is made. This reflection, I have suggested, amounts to a veritable working through of *La Guerra Sucia* and its *desaparecidos*. But just as important is that this working through—the questions of conduct and narration, the demand for information and for acknowledgment, its politics as much as its question of ethics—take shape within a continual return to law: local, regional and international, criminal and civil. Law will have given shape to the public memory of war. As the La Plata tribunal put it in its *Von Wernich* judgment in the immediate aftermath of the annulment of the amnesty laws by the Supreme Court and Congress:

> Michel Foucault speaks of the law as a 'producer of truth' and, agreeing with that concept, permit me to recall again the importance of the recognition of the truth for the construction of collective memory. Especially in societies such as ours that have suffered the genocide which led to the trial that has just been completed.[10]

In the next part of the chapter, I explore the political form and ethical demand of this memorial jurisdiction, but first some socio-legal context.

The contemporary scene of memory politics bears witness to the experience of *La Guerra Sucia* in large part through a return to criminal prosecution. Since the demise of the juntas, investigation, prosecution, trial and punishment has been extensive to say the least but it has waxed and waned. The most recent round emerged in the mid-1990s and then showed a dramatic increase with the rise of the Kirchner administration in 2003, first under the presidency of Néstor Kirchner and then with Cristina Fernández de Kirchner, the current president since 2007.

In the aftermath of a national truth commission (*Nunca más*) and the trials of the military leaders (*El Juicio a las Juntas*) in the mid 1980s, amnesties and pardons were legislated and decreed for the military. In the wake of military uprisings and as a compromise measure, Raul Alfonsin decreed the *Ley de Punto Final* (the 'Full Stop' law of 1986) and *Ley de Obediencia Debida* ('Due obedience' law of 1987) that effectively amnesties many levels of the military. Videla, together with many other

[10] Juicio a Christian Federico Von Wernich, Causa 2506/07, Tribunal Oral en lo Criminal Federal No.1 de La Plata, November 2007, 168–9 (my translation). Available at <http://www.apdhlaplata.org.ar/Fundamentos%20VW%20chico.pdf> (accessed 11 October 2011). The reference to the work of Foucault is also to be found in the earlier 2006 judgment of *Etchecolatz* (Causa 2251/06), 253–4. For commentary on these cases arguing that the pressure of civil society groups on domestic courts risks an incorrect yet understandable interpretation of the international law of genocide as the court and civil society actors go about building a collective memory, see Margarita K. O'Donnell, 'New Dirty War Judgments in Argentina: National Courts and Domestic Prosecutions of International Human Rights Violations', *New York University Law Review*, *84* (2009), 333–74, particularly 364–73.

officers, was subsequently pardoned by Carlos Menem who was elected President in 1989. These amnesties and pardons were part and parcel of a decade-long campaign of misinformation and denial by the military. In this climate, two events became important. The first is a legal innovation.[11] The Centro de Estudios Legales y Sociales—a human rights investigation, advocacy and litigation organization—launched in 1995 what have become known as 'truth trials'. They did so as a way to get around the amnesties and pardons.[12] The Centre brought cases arguing that these legal repertoires were restricted to the conduct of prosecution, conviction and punishment. As such, this left room for the court to exercise a declaratory jurisdiction. What the cases have achieved and what the courts have granted was a verdict that took the form of a declaration of truth rather than a decision of guilt or innocence.[13] The second important event was a series of high profile and publicly visible confessions and apologies by those responsible for the atrocities of the dirty war, the most infamous of which was that by Adolpho Scilingo, a naval officer who participated in the death flights (*vuelos de la muerte*) in which detained and tortured *desaparecidos* were pushed from aircraft, often while still alive, into the Rio de la Plata and Atlantic Ocean where they drowned.[14] This eruption of memories—especially since they were by those who were protected by the amnesties and pardons—in effect transformed and extended the public space within which *La Guerra Sucia* could be narrated. Within a few years, the confluence of these two forces—legal evasion of the amnesty laws, and a cultural transformation in the status of the military within public debate—ended up with Jorge Videla being prosecuted, convicted and sentenced to preventive detention for kidnapping children and falsifying documents. In what has since become known as the advocacy around 'stolen identity', the Abuelas de Plaza de Mayo launched litigation which argued, akin to the truth trials, that the amnesty laws did not apply to the kidnapping of minors, changing their identity, and various property crimes and hence the courts could hold members of the junta accountable for such crimes during *La Guerra Sucia*.[15]

[11] It is one amongst a number of contributions that Argentine domestic advocacy has made to the transformation of regional, international criminal justice, and human rights and humanitarian law. For comment on this and other contributions, see Mendez, above n 1; Pablo Parenti, 'The Prosecution of International Crimes in Argentina', *International Criminal Law Review*, *10* (2010), 491–507; and especially Kathryn Sikkink and Carrie Booth Walling, 'Argentina's Contribution to Global Trends in Transitional Justice' in Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century* (Cambridge: Cambridge University Press, 2006).

[12] For the ongoing work of this Centre, see CELS website: <http://www.cels.org.ar> (accessed 24 February 2013).

[13] On the truth trials, Juan Méndez and Francisco Bariffi, 'Right to Truth' in Rudiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (Heidelberg and Oxford: Oxford University Press, 2007); Juan Méndez, 'An Emerging "Right to Truth": Latin-American Contributions' in Suzanne Karstedt (ed), *Legal Institutions and Collective Memories* (Oxford: Hart, 2009); Sikkink and Walling, above n 11, 316.

[14] Juan Méndez and Francisco Bariffi, 'The Scilingo Case' in Wolfrum, above n 13. For analysis, see Antonius C.G.M. Robben, 'How Traumatised Societies Remember: The Aftermath of Argentina's Dirty War', *Cultural Critique*, *59* (2005), 120–64.

[15] Andrew Graham-Yool, *Who Do You Think You Are? The Search For Argentina's Lost Children* (London: Seagull Press, 2011) provides an account of the cultural resonances of the stolen identity issue and advocacy and can be supplemented by Francisco Goldman, 'Children of the Dirty

With hindsight, all these events—together with the activism and advocacy that has been ongoing since before the collapse of the juntas (most notably by the two strands of the Madres de Plaza de Mayo)—turned out to be a precursor to the current round of investigations, prosecutions, trials and judgments which began after the election of Néstor Kirchner as President in 2003. The unravelling of the amnesties[16] began to accelerate. In August 2003, the Supreme Court, with the support of the Kirchner presidency, declared the *Ley de Punto Final* (the 'Full Stop' law of 1986) and the *Ley de Obediencia Debida* (the 'Due obedience' law of 1987) unconstitutional, null and void. In June 2005, by a majority of seven to one, the judges of the Supreme Court ruled, on a case initiated by the Centro de Estudios Legales y Sociales and using the situation of a kidnapped child of the disappeared, that the amnesty laws were unlawful. This ruling effectively reopened cases—investigations as well as suspended prosecutions—which had been closed for the preceding fifteen years. It was a watershed and would continually return the narrative memory of *La Guerra Sucia* to a jurisdictional melding of domestic criminal law, regional human rights instruments and institutions, international law (both criminal and humanitarian).[17]

Since then, the number of people investigated, charged, tried, convicted and punished has dramatically increased—albeit that concern has been expressed over the speed (delay and length) with which proceedings are finalized. In the last four years, some 652 people have had criminal proceedings brought against them for human rights violations in relation to the dirty war. There was a significant increase in 2007, and then again in 2009.[18] During 2010, there was 'a marked increase over previous years'. Nineteen trials were concluded. In them, 119 people were judged: twelve already had convictions, ninety-eight were new accused, 110 were convicted and nine were acquitted.[19] One of these trials brought Jorge Videla

War: Argentina's Stolen Orphans,' *The New Yorker*, 19 March 2012, 54–65. See also Arie Gandsman's recent examination of the ways in which the lives and relationships of the children of the *desaparecidos* have become battlegrounds for transitional justice projects: 'Retributive Justice, Public Intimacies and the Micropolitics of the Restitution of Kidnapped Children of the Disappeared in Argentina,' *International Journal of Transitional Justice,* 6 (2012), 423–43. For the Abuelas, or Grandmothers of the Plaza de Mayo, see their website available at <http://www.abuelas.org.ar> (accessed 25 February 2013).

[16] Here I focus on the amnesties. The pardons also begin to unravel. In 2000, the Supreme Court in the *Mazzeo* case declared them invalid—at least in respect of those who had already been indicted but not yet convicted.

[17] Symptomatic of the synergy between domestic criminal law and international criminal law by way of the constitutionalization of human rights, Carmen Argibay, one of the majority judges in this ruling, had been a judge on the International Criminal Tribunal for the former Yugoslavia.

[18] Centro de Estudios Legales y Sociales, 'Estadísticas de los juicios por crímenes de lesa humanidad en Argentina' (the statistics are extrapolated from the table entitled 'Total personas de acusadas por delitos de lesa humanidad. Evolucion 2007–2011'). Available at <http://www.cels.org.ar/wpblogs/> ('Ver más estadísticas de los juicios por crímenes de lesa humanidad') (accessed 31 October 2011).

[19] This information for 2010 is provided in Attorney General's Office, Unidad Fiscal de Coordinacion y Seguimiento de las causas por violaciones a los Derechos Humanos durante el terrorismo de Estado, 'Informe sobre el estado de las causas por violaciones a los derechos humanos cometidas durante el terrorismo de Estado *29 de diciembre de 2010*', 1 and 4 (my translation). Available at <http://www.mpf.gov.ar/> (accessed 31 October 2011). This office and website is charged with monitoring all such criminal proceedings. Its website contains statistical information, and annual updates.

before the law yet again. He was sentenced and convicted on 22 December 2010 in El Tribunal Oral Federal No. 1 de Córdoba.[20] He was found guilty of twenty-nine counts of murder, thirty-two counts of torture which the tribunal concluded were aggravated by the condition of political persecution, and one count of torture followed by death. The charges arose out of events that occurred in the early years of the coup d'etat, when as mentioned earlier, *La Guerra Sucia* was perhaps at its most virulent. Videla was sentenced to life imprisonment (*perpetua*), which the court decided must be served in an ordinary or civilian prison in Córdoba rather than a military prison such as the notorious Campo de Mayo near Buenos Aires where he had previously been imprisoned.[21] In a judgment running to over 670 pages, the three judges not only narrated the facts and the charges that they instantiated for each of the accused but returned to the national truth commission, to *El Juicio a las Juntas* and its elaboration of a criminal regime that was both official and clandestine, to the amnesties and pardons and their constitutional invalidity, and to the cases that were reopened including the La Plata tribunal judgments of *Von Wernich* and *Etchecolatz* which emphasized the Foucauldian idea of the law as 'a producer of truth' (*productor de verdad*) and its importance for the transformation of collective memory.[22] In addition, the judgment engaged in the various controversies that have marked the doctrinal disputes arising from the increasing internationalization and regionalization of Argentina's criminal jurisprudence since the mid-1990s.[23] However, the case was distinctive. As the tribunal declared, the military dictatorship's so-called war against subversion ('*lucha contra la subversion*') set up a criminal apparatus of power which operated 'in coordination with or with the consent of the rest of the legal institutions of our country'.[24] But beyond this general association between the military, 'state terrorism' and legal institutions, the tribunal also specified that members of its own court had been complicit in the apparatus of repression: '[T]he various testimonies that we heard in the debate have shown us that there was a total lack of protection [*desprotección*] and absence of commitment on the part of the judiciary'.[25]

In a brief response to the judgment of the Córdoba tribunal, Ruti G. Teitel asks 'what can such a verdict mean so many years after the restoration of democracy in Argentina?' Her answer is brief and decisive:

> Not giving up on accountability, despite the passage of time, sends an important message about human rights, and the distinctive nature of these offences as 'crimes against

[20] The *Videla* case, decision dated 22 December 2010. Available at <http://www.eldiariodeljuicio.com.ar/> ('22/12 Sentencia Descargá la sentencia completa') (accessed 31 October 2011).

[21] During the dirty war the military barracks at Campo de Mayo near Buenos Aires was the site of an estimated 5,000 detentions, arising from abductions, and with consequential tortures and deaths.

[22] Córdoba judgment in the *Videla* case, decision dated 22 December 2010, 29 (my translation). Available at <http://www.eldiariodeljuicio.com.ar/> ('22/12 Sentencia Descargá la sentencia completa').

[23] For a useful conspectus of the disputes in English published just before the judgment of the Córdoba tribunal, see Pablo F. Parenti, 'The Prosecution of International Crimes in Argentina', *International Criminal Law Review*, *10* (2010), 491–507.

[24] Córdoba judgment in the *Videla* case, above n 22.

[25] Córdoba judgment in the *Videla* case, above n 22, 340–1.

humanity' . . . Years later, what's at stake is not just punishment but also political truth . . . That lesson, handed down along with the judgment against Videla, vindicates efforts to establish a global rule of law.[26]

Rather than frame the memory politics of the last thirty years in terms of a vindication of rights and a normative shift that presupposes a settled rule of law, the remainder of this chapter proceeds to explore a criminal jurisdiction of memory which works through the trauma of *La Guerra Sucia*. The lineaments of this memorial jurisdiction are here held to the conduct and practices of law. By way of a consideration of the difficulties that beset the effort of narrating a legal case history, it will engage the temporality of a life lived with law, the predicament of memory, and the slippages and complexities of representation. In order to address these matters, I turn to a recent film by the Argentine director Juan José Campanella.

(III) A Memorial Jurisdiction

Towards the end of the film *El Secreto de sus ojos* (The Secret in Their Eyes), the protagonist—a recently retired deputy clerk in an examining magistrate's court[27] who has spent his life working in the criminal justice system of Buenos Aires—asks, 'How can someone live an empty life? How do you live a life full of nothing? How do you do it?'

HASTINGS: How does the case proceed?[. . .]
ESPOSITO: How can I do nothing about it? I've been asking myself for 25 years and I've only been able to come up with one answer. 'Forget it, it was another lifetime. It's over, don't ask.' It wasn't another lifetime. It was this one. It IS the one.
I want to understand. How can someone live an empty life? How do you live a life full of nothing? How do you do it?[28]

The film offers a range of responses to this problematic of the intimacies of the legal case history. These responses, I want to suggest, mark the film as a contribution to the contemporary annals of international criminal justice, its narrative memory and its minor jurisprudence of dirty war crimes.

El secreto de sus ojos is the story of Benjamin Esposito, a law clerk, who is trying to write a novel in his retirement. The novel, he imagines, is based on a case he was

[26] Ruti G. Teitel (2011). 'Justice Delayed, But Not Denied,' *Tico Times* [online newspaper], <http://www.ticotimes.net/Opinion/Previous-perspectives/justice-delayed-but-not-denied> (accessed 31 October 2011).

[27] The film, while not inaccurate, brushes over the precise legal office of the protagonist, Benjamin Esposito. I have followed the convention of the novel on which it is based—*La pregunta de sus ojos* by Eduardo Sacheri—and which is somewhat more precise on this issue. The protagonist is a deputy clerk in one of two clerk's offices in a court presided over by the examining magistrate. He is part of the investigative jurisdiction. As deputy clerk he is the primary administrator of the clerk's office. It is a sore point for him, in the book, that he never finished his legal studies.

[28] *El Secreto de sus ojos* (The Secret in Their Eyes) (dir Campanella, 2009). All unattributed quotations in the remainder of the article are from this film, and use the English translation in its subtitles.

involved in some twenty-five years previously—the rape and murder of a young female schoolteacher. As he writes, he narrates the case but is assailed by images. Esposito and his colleagues Hastings and Sandobal investigate and hunt down the perpetrator Isidoro Gomez in mid to late 1970s Argentina. After several years, the killer rapist is caught by Esposito and sentenced to life imprisonment. The death penalty, as he explains to the victim's grieving husband, does not officially exist in Argentina. However, after two years in prison, Gomez is released by executive order. The release and order is engineered by one of Esposito's fellow law clerks in order to use the killer's talents in a secret police squad against 'subversives'.[29]

This is one of the many echoes in the film of that mix of democracy and authoritarianism that has characterized Argentinean law and politics from Juan Perón onwards. And in fact the story of the film is cut from the weave of this political cloth. More specifically, it begins in 1974, just before the death of Juan Perón and the succession of his third wife Isabel to the presidency. It also sets the office politics of the law clerks and judges in the context of the imminent dirty war, and then returns to its contemporary aftermath with the resurgence of memory projects and criminal prosecutions described above. In the foreground however is the narrative of the criminal case—the crime, its investigation and its subsequent history. The 'Morales case', as it is referred to in the film, reverberates throughout the lives of all the characters involved in it: the deputy clerk (Esposito), his fellow clerk and friend (Pablo Sandobal), his senior colleague (Irene Hastings, variously clerk and judge), the surviving husband of the rape and murder victim (Ricardo Morales), and the perpetrator of the crime (Gomez). How is this presented?

From beginning to end, the film is staged as a meditation on memory and in particular the memory of law, of crime, and of desire. It is the clerk Esposito who remembers. However, his memory is not of a singular past but instead *El secreto de sus ojos* presents us with *fragmented strands echoing in a ruptured present*. The film moves between four times in which the present of legal recall does not occupy the position of mastery. The film begins with that present but quickly shows it to be the site of an overwhelming return of the past, unsettling everyone's settled accounts of the case—crime, investigation and denouement. The enigma around which this traumatic history is organized and emplotted involves Esposito's relations with two characters—Morales, the grieving husband, and Hastings, the judge and colleague with whom he is secretly in love. These two relations establish the double meaning of the title of the film. First, it is while looking at an old photograph of the victim with her husband that Esposito and, unwittingly, the husband discover

[29] Consider the decrees by Isabel Perón allowing the military to take action against 'subversives'. Arrest warrants were later issued against her concerning forced disappearances during her presidency. She was arrested in Madrid where she was living in 2007 but in 2008 the Spanish courts rejected her extradition to Argentina. Isabella (or Maria Estela Martinez de Perón) was president from 1 July 1974 to 24 March 1976. The film begins, and the memory of the crime goes back to the day of the murder (21 June 1974) a few weeks before the death of Juan Perón and her ascension to become the 42nd President. As a result of the coup that initiates the dirty war, Jorge Videla replaces her as president. The paramilitary group known as the triple A or AAA (*Alianza Anticomunista Argentina*) was particularly active during her Presidency, and then moved from the Peronist right to the military junta.

the identity of the killer and rapist. The discovery is based on the intensity of the perpetrator's gaze at the now-dead woman. Second, throughout the film it is the exchange of glances and gazes rather than dialogue between Esposito and Hastings that cinematically establishes the currents of desire between them both now and in the past. Bringing these two together, Esposito will say to Hastings:

> It's the look in their eyes. That's the key.
> You see this kid looking at the woman . . . Worshipping her.
> The eyes . . . Speak . . . They bullshit too, they should keep quiet.
> Sometimes it's better not to look.

While the content of the dialogue refers to the gaze of the criminal, the camerawork during the exchange establishes the ocular proof, reveals the untold story, of the Esposito–Hastings relation.

These two relations provoke a doubled past in the memory of Esposito, but importantly, although these remembered pasts overlap they are not coterminous, joined but not precisely identical. Similarly, in the present, while he is struggling to express himself he is compelled to confront both characters because of the continuing effects of his past entanglements with them both. This has the effect that the last third of the film stages Esposito's attempt to hold on to both relations and both histories. The film ends by promising that this attempt is successful: the past confronts the future in the moment of a present that offers the contingent possibility of reconciliation. Significantly, though, the law clerk—now retired—will continue to be unable to speak his desire, but such inability does not arrest him. At the end, he does not give way on his desire.

This then is the narrative of the film—its enigma and emplotment. Let me return to the question that the law clerk asks but cannot get his head around: 'So, how is it possible to live a life full of nothing, to live an empty life?' The film stages two responses for us. Both involve trauma and the relations of memory and narrative that it enfolds.

One response concerns the life story of the law, and the task of beginning. The very first scene of the film is presented as a scene of writing and its subsequent erasure, literally: the retired Esposito is beginning to write the novel based on his memory of the Morales case, but he continually scores out and increasingly fills up the waste bin. He visits Hastings, who is now a judge, and recounts: 'My biggest problem is that I've started fifty times and never got past the fifth line.' She offers him three responses: first, disbelief ('What do you know about writing novels?'); second, a typewriter fondly described as the 'old Olivetti'; and finally concrete instruction on how to proceed (start 'wherever you remember the most . . . which part comes back most often? That's the image you should start with'). Start not with the word but with the image. What is this image that returns to assail him and arrest the possibility of narrative? The expectation set up by the film editing is that the reader will be shown the scene of the crime that begins the story of the Morales case. Instead, there is a reverie, a daydream, in which Esposito recalls when he met Hastings and fell in love at first sight. It is only then that the film moves to a subsequent point in the past and the event of the Morales rape and murder. These

two intersubjective relations determine the shape of the narrative of the case that Esposito will have produced.

He feels the need to start writing, then, but he suffers from the impossibility of beginning at the beginning. Why? At one and the same time, he experiences the last twenty-five years, the time since the Morales case, as his life being 'sidetracked'. The impossibility of beginning is that beginnings are always plural, perhaps even too many. As Esposito remarks at one point, 'I remember plenty of beginnings but I'm not sure what they have to do with the story.' Hastings rejoins: 'Then start at the beginning and stop dwelling on it.'

We dwell in the middle. A life full of nothing is a life overflowing with the intimacies of the office, work, marriage, political relocation and not a few affaires. That this both arrests the narrative, *and importantly* is a spur to writing life, is made explicit in the film by the circulation of the 'old Olivetti' typewriter which Hastings gives to Esposito as part of the instrumentality of narrative. The typewriter's letter 'A' does not work, does not leave a black letter on the page, leaves a blank space. This is one place where a minor but structuring detail provides a meeting point in the film between the life of law and the memory of the dirty war. As noted earlier, AAA or *Alianza Anticommunista Argentina* was active during the presidency of Isabel Perón. With the return to criminal prosecution that has marked the memory politics from the mid-1990s, there has recently been a prosecution of the Triple AAA for dirty war crimes *prior* to the coup on 24 March 1976. And in the film we see various characters in the institutions of law expostulating in frustration about how hard this typewriter makes it for them to do their work of writing files, binding files, filling in forms, witness depositions, and writing memos that overflow the desks and offices that occupy the built legal spaces of the film. As the old Olivetti is passed from character to character, it would seem that its function is that of the macguffin, the cinematic object whose circulation is devoid of meaning and reference beyond making us aware that we are watching a film. However, in *El secreto de sus ojos*, the malfunctioning typewriter becomes the circulating representation of trauma: a prosaic emblem of an unassimilable experience that overwhelms the life of law and its characters, and which Esposito *works through* as a legal case history. After all, it is the addition of the letter 'A' to a word that had come unbidden to the lawyer while he slept and which he had written on his bedside pad that will have converted 'I fear' (TEMO) into 'I love you' (TEAMO). 'A', the first letter of the alphabet, is the emblem of a life 'lived with' trauma and law that dwells between a 'never again' and a 'moving on'.

The trauma of beginning is also staged as the trauma of being in love for the criminal lawyer. Repeatedly, time and time again, Esposito is shown to be arrested by the experience of love. The loquacious law clerk who has a facility with repartee is rendered speechless when it comes to the articulation of his feelings for his senior colleague. The lawyer's unspoken love for Hastings is mirrored by the love for the dead victim by her surviving husband. This love, and its relation to memory, provides the setting within which the film works out a second response to the question of how to live a life full of nothing.

The husband, Ricardo Morales, is a character who appears in the aftermath of the crime (of murder and rape). Remaining, he suffers. He weeps for his dead wife, he gazes at her photographs, he speaks about her in the present tense. He says: 'I know I'm in denial but…it helps me go on until we find the guy.' This performance is highly ritualistic, which for me recalls the protests of the Madres de Plaza de Mayo moving counter-clockwise, same time, same day and same place in a crowded plaza. In the film, at the same time each day, Morales sits on the same bench at a train station looking for the perpetrator who is believed to be commuting in and out of Buenos Aires. He keeps a vigil, held in the moment after his wife's murder. Out of this experience Morales will construct punishment for the perpetrator as a way of addressing the question of how to live a life full of nothing. For Esposito, writing the case history provides a way of working through crime and its repetition in parts and images. For the husband Morales, working through requires punishment—and specifically life. As the Córdoba tribunal in the Videla case inscribes the sentence in 2010: *perpetua*.

Over the course of a series of conversations initiated by Esposito, Morales broaches the form of punishment to be meted out to the killer. Esposito imagines that Morales might find a sense of retribution in the death penalty, but is surprised when the grieving husband eschews it. For Morales the death penalty is not enough. He concludes: 'No. Let him grow old. Live a life full of nothing.' It is this comment which provides the enigma for Esposito and which he struggles to emplot. For Morales, it becomes a programme of action which he will recount some twenty years later to Esposito: when the perpetrator was released after two years from the sentence of life imprisonment, Morales captured him and detained him in a cell which he had secretly constructed on a rural property.[30] For twenty years, Morales has lived his life in a *pas de deux* with the killer of his wife. Detention *en perpetua* as a life full of nothing: without company, without conversation, without daylight, without hope.

Why does Morales keep him in detention? It is neither revenge nor proportionality. Both these are ways—as Foucault has shown—of instituting, codifying and maintaining a memory of the crime, and variably in the mind or body of the individual and the public.[31] But the film shows Morales discovering the *instability* of memory. As he says while waiting at the train station:

[30] There are a number of intertexts that are relevant here. One is the web of secret detention centres—known as 'pits' (*pozos*) and 'black holes' (*chupaderos*)—that form a large part of what made the dirty war crimes 'clandestine'. Another is literary. It is difficult not to hear a dialogue with Chilean playwright Ariel Dorfman's *Death and the Maiden* (New York, NY: Penguin, 1992), especially in their respective staging of the world shattering relation between victim and perpetrator, torturer and tortured. A third would be that the trigger for the capture and detention of the killer-rapist by the grieving husband is that the killer has been imprisoned and then released by executive order. This was the fate of Videla and other military after the *El Juicio a las Junta*, with the amnesties of the *Ley de Punto Final* (the 'Full Stop' law) and *Ley de Obediencia Debida* ('Due Obedience' law).

[31] This concern with law as a system of memory is most explicitly spelt out in *Discipline and Punish* (London: Allen Lane, 1977). The monarchical system of the ancien regime and the deterrent regime of the philosophes are presented as two juridical techniques for the codification of memory; the former through the body of the condemned and the theatre through which the spectacle of execution addresses its public; the latter through the mind and a generalized resemblance.

The worst part is I'm starting to forget. I have to constantly make myself remember her. Every day.

The day she was killed, Liliana made me tea with lemon. I'd been coughing all night and she said it would help. I remember these stupid things. Can you see? Then I start having doubts and I don't remember if it was lemon or honey in the tea. And I don't know if it's a memory or a memory of a memory I'm left with.

A life with the killer allows Morales to keep memory alive but at the cost of the perpetual occupation of the position of grieving survivor, the one who subjects himself to the duty to remember. Like the Vietnam vet who refuses to take the drugs that will get rid of the horrific hallucinations that possess him on his return from the war. As the veteran says, 'I do not want to take drugs for my nightmares, because I must remain a memorial to my dead friends'.[32]

These then are two ways to live a life full of nothing, two ways to live with the trauma of a legal case. What remains is the conduct of criminal law. It is possible that this conduct—whether local, regional or international or, as is more likely, some melding of the three—engages the obligation to acknowledge experiences of mass atrocity in a time *between* never again and moving on. In the time that remains, this liminal possibility and the predicaments that beset it are explored in terms of the rhetoric of testimony and the logic or taxonomy of international criminal law.

(IV) Remnants

> 'There exist no provisions in our law, that perfectly and precisely describes the form of criminality that shall be judged here.'
>
> —Julio Strassera, *El Juicio a las Junta*[33]

International criminal justice arrives on the scene too early or too late. But never quite on time. Its temporality is that of deferred action. If we return to *El secreto de sus ojos*, the film is concerned with a similar constitutive delay; it relates the difficulties encountered by those who arrive in the aftermath of a crime, the aftermath of an atrocity.

While this temporal predicament is news to few, what is perhaps less appreciated is its effects on the conduct of (international) criminal justice and the ethics of acknowledgement. International criminal law is repeatedly confronted with individual and collective situations of oppression and injustice to which it is called upon to respond. At the same time, it is confronted by atrocities and injuries which are unutterable—and that it is this very unspeakability which positions the event as atrocious and which calls for legal representation. In short, *the obligation to represent comes up against the unpresentability of the event*. This is not simply a

[32] *Achilles Heel*, quoted as the epigraph to Cathy Caruth (ed), *Trauma: Explorations in Memory* (Baltimore, MD: Johns Hopkins University Press, 1995).

[33] As quoted in Osiel, *Mass Atrocity,* above n 5, 122.

matter of noting that law remains silent about particular injustices and mass atrocities. As was said in the account of memory politics with which this chapter began, it is important that data is collected, the numbers of the dead and the dying are counted, the statistics tabulated, the stories iterated and disseminated, the crimes legally enumerated in statutes and the enumeration expanded if necessary. A lack of information is not the predicament I have been trying to get at here. Rather, the event is atrocious precisely because it is a constitutive limit of representation and information. This is not an obstacle or hurdle to be overcome by yet one more effort.[34] There is a constitutive inaccessibility to experiences of trauma. Not all experiences of atrocity and injury are traumatic—and in saying this I do not want to downplay the sadness and injustice of these experiences. It is their return to possess us that constitutes them as traumatic. In sum, *it is the very inaccessibility of trauma which generates the demand and struggle for narrative self-representation*. This is the paradox of narrative memory: to narrate the event where the conditions of the event remove the very possibility of narrative representation. As my account of memory politics at the start indicated, this predicament can be broached in a number of ways. In cognitive terms, it is the tension between information and understanding; in ethical terms it is what has come to be called 'bearing witness' rather than providing proof, conducting a hearing rather than reporting on phenomena; and in aesthetic terms it is the difference between representation and expression. Here, it will be presented as a matter of *working through* the inaccessibility of trauma—first in terms of the genres of representation, then in terms of the taxonomies of international criminal law.

Consider the genres of representation. As already mentioned, in *El secreto de sus ojos*, Esposito is trying to write. But in tension with the fact of his compulsion to narrate the Morales case is the question of the form of representation that this narration takes. If Esposito is to be believed, then he is writing a novel. However, he comes up against the incredulity of Judge Hastings:

> HASTINGS: What do you know about writing novels?
> ESPOSITO: I've been writing novels all my life.Take a look in the archive.
> HASTINGS: Oh the case files. How many pages will your file be?

Upon being shown Esposito's finished efforts, Hastings is no less sceptical: 'It's a novel. It doesn't have to be true or even believable… ' And when Esposito shows his draft to Morales, he is met with a similar reminder of what he has done. Morales remarks offhandedly: 'You should flesh it out. It's like a long memo.'

Just when Esposito thinks that he is writing a novel, the responses of others, which he has sought out, indicate that the archive is writing him. In *representing* the case as a novel, what is *expressed* is a file or a memorandum, an artefact that emerges out of the archive of his office—the court documents which he has

[34] Short of a revolution, it is the juridical tradition that will have to be engaged. But part of the difficulty is that the conventional understanding of revolution is to present it as rupture, a zero sum game. Yet, modern revolutions—and transitional societies are exemplary here—most often take the form of negotiated settlements.

submitted for signature by his judge, the dossiers that pile up on desks, the loose case documents that the viewer is repeatedly shown being stitched together with sisal cord out of memoranda by his assistant Sandobal 'with a surgeon's movements, an artist's grace, and the solemnity of an officiating priest',[35] and so on. The paradox of testimonial conditions of trauma is that testimony is not simply confronted by an experience that takes place in time, but also involves others. There can be no *acknowledgement* of trauma without the marks of genre. It is this condition of address that generates the difficulty of deciding whether the case history he is writing is a novel, a file or a memorandum.

Akin to the difficulty of pinning down the genre of the lawyer's writing, international criminal law has, since its inception in the aftermath of the World War II, been given shape by a difficulty of classification and its logics of memory.

Consider the subject of international criminal law. Is it law? And if law, is it international law or criminal law? The fact that it is international lawyers engaged with crime does not necessarily turn what they say into international criminal law, just as the fact that it is criminal lawyers talking about international law does not turn their commentary into the doctrines of international criminal law. And the difficulty becomes even more acute—beyond simply its much-vaunted fragmentation—with 'the contemporary conflation of human rights law, criminal law, and the international law of war' that 'implies a pronounced loss for those seeking to challenge state action'.[36] And if the critic is deprived of a language of critique, then the problem also recurs for those interested in a less normative characterization. In Argentina, the eruption of memory politics as a question of criminal jurisdiction has seen a cross-fertilization of domestic constitutional law, regional human rights law in the guise of the Inter-American Court of Human Rights, and international criminal law from the Nuremberg trials to the International Criminal Court via the ad hoc tribunal for the former Yugoslavia. This has seen Argentine case law, as Pablo Parenti remarks, carry out a procedure of 'double classification': the facts of the charges instantiate a legal crime under domestic criminal law and a legal category (crime against humanity) under international criminal law.[37] But even this, as the Córdoba tribunal's judgment in the 2010 *Videla* case illustrates, generates anxiety over breaching the double jeopardy rule, or worse, produces a double punishment. What it foregrounds is that, when considered as a jurisdictional device through which law conducts itself, the conduct of international criminal law circulates between the nominative (definitional), the adjectival (evidential) and the adverbial (procedural). This is particularly evident when it comes to addressing the coincidence of the category of murder and the category of crime against humanity. Here, murder has a nominative place in domestic criminal law, an adjectival place in as much as it is part of the enumeration of the crime against humanity, and an

[35] Eduardo Sacheri, *The Secret in Their Eyes*, trans. John Cullen (New York, NY: Other Press, 2011), 102. As Vismann has reconstructed for us, the history of the law is a history of the file: see Cornelia Vismann, *Files: Law and Media Technology* (Palo Alto, CA: Stanford University Press, 2008).

[36] Ruti G. Teitel, 'Transitional Justice Genealogy,' above n 8, 91, 92.

[37] Parenti, above n 23, 498–507.

adverbial place in as much as the statute of limitations restricts prosecutions for murder in domestic law but not for crimes against humanity under international criminal law.[38] Law moves between and across the various parts of speech without ever quite settling down.

At this point, however, the question of the subject of international criminal law has moved from the jurisdictional forms of law to the classification of crime. Crime has also stood in to unify the disparate and plural utterances of international criminal justice. But which crime? Most obviously, the crime that unifies the subject would seem to be 'war crime' but it was precisely the war crimes paradigm that created so much difficulty in holding on to what was unprecedented in the Holocaust at the Nuremberg trials as much as the Eichmann trial. Isn't it this unprecedented quality which the category of 'crimes against humanity' was to address? Since its introduction there has been considerable uncertainty as to its scope and meaning, and each category has been interpreted by reference to the other. Initially, the war crimes paradigm was simply extended to interpret the crimes against humanity prohibited at Nuremberg; yet since the 1970s and more obviously since the 1990s, the paradigm of crimes against humanity—at least in the context of atrocity—has given content to war crimes as violations of human rights.[39] And if, as some have argued, the jurisprudence of the courts has left this distinction behind, then it has reappeared in different idioms. For example, consider the jurisprudence of rape that has emerged out of the ad hoc tribunals for Rwanda and the former Yugoslavia. The incorporation of the social recognition of rape and sexual violence against women into a legal recognition was staged initially as a question which foregrounded the problem of classification. Can rape be prosecuted as torture, as genocide, as a crime in its own right or as a crime of honour? All, one or none? And when it comes to juridically defining the crime of rape, when such is necessary, the definition is construed in terms of violence or consent. Here, it remains to simply note that the jurisprudence of rape has restaged the slippages between the war crime paradigm and the crime against humanity paradigm in the idiom of violence and consent.

In all this, the classification of crime and the forms of legal speech emerge as the jurisdictional struggle of legal doctrine to hold on to a position of interiority, just as the genre of Esposito's writing emerges as the point of contestation between himself, his addressees, and the case history that he has so much difficulty beginning. The conceit of this chapter, then, is that a criminal jurisdiction of memory can be treated as a case history, such that its narrative genres, compulsive repetitions, and

[38] For an illuminating and somewhat illustrative piece on these matters, see Parenti, above n 23, 497.

[39] This was one of the objections that Hannah Arendt in *Eichmann in Jerusalem* (New York, NY: Penguin, 2006) had with the tradition stemming from Nuremberg. Under the war crimes paradigm, what is prohibited is the cruelty of the conduct, as if war had norms and the criminals were simply breaching the settled rules of war. In the crimes against humanity paradigm, Arendt glimpsed a different tradition—not so much an extension of the war crimes paradigm of cruelty measured against the humane but something unprecedented which would reflect the unprecedented quality of the holocaust and measure against the human. A helpful reading of Arendt for international criminal lawyers which catches at the edges of this question has been provided in David Luban, 'Hannah Arendt as a Theorist of International Criminal Law', *International Criminal Law Review*, *11* (2011), 621–41.

blank letters bear witness to the trauma of its speech. International criminal law lives a life full of nothing if its settled accounts of law and crime are not unsettled by the injustices and atrocities to which it is called upon, sadly, to respond. Setting out from the perspective and tradition of memory politics and its ethics has suggested that attention to the conduct or enunciation of international criminal law provides resources for working through that unsettled history.

PART 7

HISTORIES OF A TYPE: EXCAVATING THE CRIME OF AGGRESSION

19

The Crime of Aggression: From the Trial of Takashi Sakai, August 1946, to the Kampala Review Conference on the ICC in 2010

*Roger S. Clark**

(I) Introduction

At the Review Conference on the International Criminal Court (ICC) held in Uganda 31 May to 11 June 2010, the States Parties to the Rome Statute brought to a next stage the efforts to define the crime of aggression and to set out the 'conditions' for the Court's exercise of jurisdiction over the crime.[1]

I want to use the August 1946 trial of the Japanese general, Takashi Sakai, by a domestic tribunal in Nanking, the Republic of China, not so much to think about the exercise of jurisdiction by an international tribunal like the ICC or the International Military Tribunal for the Far East as to think both about the meaning of the concept of a 'crime against peace' or the 'crime of aggression'[2] and about the

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[1] Article 5(1) of the Rome Statute of the International Criminal Court, adopted in 1998, included aggression within the crimes over which the Court has jurisdiction, but Article 5(2) required further work leading to a 'definition' and 'conditions for the exercise' of that jurisdiction. This became the main item on the agenda of the 2010 Review Conference. A comprehensive resolution of the aggression issues left over from 1998 is contained in the Review Conference's Resolution 6, ICC Doc. RC/Res. 6 (2010) (Kampala Amendments). See Roger S. Clark, 'Amendments to the Rome Statute of the International Criminal Court Considered at the first Review Conference on the Court, Kampala, 31 May–11 June 2010', *Goettingen J. Int'l L.*, 2 (2010), 689.

[2] The terms are interchangeable. Generally speaking, the term 'crimes against peace' was the more common usage in the 1940s and 50s; by the time of the International Law Commission's (ILC)'s Draft Statute for an International Criminal Court in 1994, United Nations (UN) General Assembly Official Records, 49th Sess., Supp. No. 10, UN Doc. A/49/10 (1994), 'crime of aggression' had largely captured the day. An early analysis of the crime, which influenced the negotiations on the *Nuremberg Charter* and thinking on the subject at the time of *Sakai*, is A.N. Trainin, *Hitlerite Responsibility Under Criminal Law* (n.d. probably 1945 English trans.). Professor Trainin, using both terms, set the stage for much of the later discussion with these words, at 35:

> The direct and most dangerous form of offence against peace is the attack of one State on another—aggression—which directly breaks the peace, and forces war on the peoples. Aggression is, therefore, the most dangerous international crime. In the interests of the struggle for peace, the penalty for the crime must fall not only on those guilty of carrying

exercise of national jurisdiction. My three basic questions go to (a) *what is* the crime of aggression; (b) *who* can commit it (politicians? Colonels? Foot soldiers? The janitor at the Ministry of Foreign Affairs?); and (c) *where* may they be prosecuted (only in an international tribunal? In an aggressor state? In a victim state? In any state that volunteers for the task?). In raising the set of questions about 'national' jurisdiction, I thus have in mind not only jurisdiction by a 'territorial' or 'victim' state, such as China was, but also those 'third party states' who might claim to exercise some version of universal jurisdiction.[3] Now that the main unfinished business of Rome has been brought closer to completion,[4] it is time to consider more carefully issues such as these which are highly relevant to what states need to do, or may do, when they accept the Statute as amended.

I do not suggest for a moment that *Sakai* provides a definitive precedent for anything, but I do find it enormously suggestive. The account of the trial as it appears in the Reports of the United Nations War Crimes Commission[5] is brief and conclusory. I have been able to supplement that account. Professor Suzannah Linton kindly shared with me a document in English entitled *Summary Translation of the Proceedings* which she located in the National Archives in London. It appears to be the immediate source of the published report.[6] At my request, Jingsi Wang,

> out aggression, but also on those who try to fan the flame of war, who prepare aggression. Activities preparing the ground for aggression must comprise the conclusion of blocs and agreements having the aim of aggression (as, for example, the 'Axis' Treaty between Germany and Italy); the infringement of treaties which serve the cause of peace; the provoking of international conflicts by all kinds of means; the propaganda for aggression.

(Footnote emphasizing that aggression does not 'refer to just wars, wars of liberation' omitted.)
In spite of such arguments, preparation for war alone never gained much traction as an inchoate offence, although the Kampala amendments catch in the criminal net those who prepare or plan for an aggression which is in fact completed. See text at n 25 below.

[3] It is common, in the Anglo-American literature at least, to speak as though there is something of a closed list of bases of national jurisdiction that are acceptable in at least some circumstances: territorial (including 'objective territorial' or 'effects'), nationality (or active personality), passive personality, protective and universal. See generally Ellen S. Podgor and Roger S. Clark, *Understanding International Criminal Law* (New York, NY: LexisNexis, 2nd edn, 2009), 25–6. As we note there, State practice is richer than that; it includes other bases that seem to be acceptable such as 'landing state jurisdiction' (the place where planes or ships arrive following criminal activity) and 'transferred jurisdiction'. There is no need to pursue exotic alternatives here, since the classic categories cover the jurisdictional field for at least the issues with aggression that were current in the 1940s and even now.

[4] The ICC will finally be able to exercise its jurisdiction over the crime of aggression one year after thirty States have ratified the Kampala amendments and there is a further decision from the Assembly of States Parties (ASP) bringing everything into effect, whichever is later. The ASP decision may not take place before 1 January 2017.

[5] *Trial of Takashi Sakai*, United Nations War Crimes Commission, XIV Law Reports of Trials of War Criminals 1, Case No. 83, Chinese War Crimes Military Tribunal of the Ministry of National Defence, Nanking, 29 August 1946 (the Report). Philip R. Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945–51* (Austin, TX: University of Texas Press, 1979), 164–5 has some newspaper references that reinforce the material in the report. *Sakai* was one of a number of trials held in Nanking, but the only one reported in the United Nations collection. Piccigallo's book is the most comprehensive discussion of the Nanking Trials that I have found in English.

[6] The summary translation (Summary Translation) is organized under two headings, 'Facts' and 'Reasons'. The material therein appears (somewhat edited and re-organized) as 'Facts and Evidence', 'Defence of the Accused' and 'Findings and Sentences' of the Tribunal in the Report. The report also contains four pages of 'Notes on the Case', supplied by the UN War Crimes Commission editors.

a graduate student at Beijing Normal University, College of Criminal Science, located several Chinese secondary sources mentioning this and other Nanking prosecutions. He also discovered that China's Second Historical Archives in Nanking have the *Sakai* judgment but that the archives are not open to the public. He was, however, successful in obtaining what appears to be a copy of all except a page or two of the whole judgment (in Mandarin) in the archives in Taipei. Yiqiang Lin was kind enough to translate this version for me.[7] It is fairly similar to the two derivative documents, except that it contains a lengthy and very interesting 'Attachment' that summarizes the evidence involving Sakai. Neither the determinative facts nor the legal theories relied upon by the Tribunal are articulated with total clarity in any of the versions. But that is perhaps the beauty of the trial to the speculative mind.

Essentially, here is what happened. Sakai, a Japanese military officer, who eventually retired as a general in 1943, spent a period as a military commander in China during the war commencing in 1939, and prior to that during the Sino-Japanese hostilities from 1931 onwards. For the most part, his activities in the 1930s involved consolidating and expanding Japanese control in an undeclared war, rather than engaging in wholly new invasions. While not a great deal is made of it in the proceedings as a crime against peace, the highlight of his career as a leader seems to have been taking charge of the invasion of Hong Kong in December 1941,[8] an operation that did not go as smoothly as his superiors had hoped.[9] He was a joint holder of the post of Governor of Hong Kong for a while. A decade earlier, in 1931, he was responsible for creating terrorist disturbances in what are now known as the cities of Beijing and Tianjin and in the province around them (Hobei, or 'Hopei' at the time). In 1934, following assorted assassinations, he threatened to attack Beijing and Tianjin by artillery and air and effectively placed Hobei under Japanese control. Aside from Hong Kong, it is not entirely clear what new incursions he was involved

The Notes include some matter in the judgment and the Summary Translation that is omitted from the Report.

[7] 'The judgment'. I hope that it will be published.

[8] The Hong Kong invasion seems to be treated, almost in passing, as one aspect of Sakai's involvement in the aggression against China. On the other hand, the Attachment to the Judgment contains twenty-one paragraphs of findings about war crimes and crimes against humanity attributed to him in respect of atrocities committed by his troops in Hong Kong, especially against prisoners of war and medical personnel. There is no discussion in the materials of the (then) international status of Hong Kong as British rather than Chinese territory. Does the tribunal assume (a) that Hong Kong was part of China, or (b) that, even if it was to be regarded as within the sovereignty of Great Britain, there is jurisdiction over such crimes anyway in a domestic tribunal under some kind of universal theory, or (c) neither of the above? The trial in question was conducted by the Nationalist or 'Republic of China' authorities that currently occupied the Chinese seat at the recently established United Nations. The Republic apparently regarded Hong Kong as part of China but did not resist the British placement of it on the General Assembly's list of non-self-governing territories. After the People's Republic took up the Chinese seat in New York, it insisted successfully that it be removed from the list, as it was to be considered part of China. See Letter of March 8, 1972 from the Permanent Representative of China to the United Nations addressed to the Chairman of the Special Committee on decolonization, UN Doc. A/AC.109/396 (1972).

[9] In a passage omitted in the later material, the judgment records that he led a large number of troops that attacked Hong Kong by surprise on 8 December 1941, ordering his troops to take it

in after 1939, although it appears from the judgment that he was commander of the army stationed in Guangzhou (Canton) and Hainan in southern China when he was sent to take Hong Kong; and some of his war crimes were also alleged to have taken place in the south, on Hainan Island and in 'Kwantung'—which in context seems to be another English transliteration of Guangzhou/Canton.[10] He was convicted of crimes against peace, war crimes, crimes against humanity[11] and, it appears, 'offences against the internal security of the State [which] should be punished in accordance with the Criminal Code of the Republic of China'.[12] Sentenced to death, he was duly executed by a firing squad on 30 September 1946.[13]

In a project like this, dedicated to unearthing the obscure, I suspect that someone will prove me wrong, but here goes: Sakai was the first Japanese accused to be convicted of a crime against peace[14] and the first—and perhaps the only one—to be shot for it.[15] His conviction and execution pre-dated the decisions of both the Nuremberg and Tokyo Tribunals.[16]

within two days. The siege continued until the 17th because of unexpected resistance 'which made [Sakai] turn to revenge by brutality'.

[10] 'Kwantung Army' is also a term used to describe the Japanese crack forces that occupied Manchuria in the north.

[11] The material offers no indication of what the Tribunal regarded as the legal basis of a crime against humanity. The Tribunal is merely quoted as saying:

> In inciting or permitting his subordinates to murder prisoners of war, wounded soldiers, nurses and doctors of the Red Cross and other non-combatants, and to commit acts of rape, plunder, deportation, tortures and destruction of property, he had violated the Hague Conventions concerning the Laws and Customs of War on Land and the Geneva Convention of 1929. These offences are war crimes and crimes against humanity.
>
> Report, above n 5, (Notes) 7.

The 'source' of crimes against humanity as understood at Nuremberg was general principles of law, rather than anything to be found in the black letter of the Geneva or Hague Conventions. There is, however, an echo of the Martens clause in preamble to the 1907 Fourth Hague Convention in the concept of crimes against humanity. The big difference is that Hague and Geneva required a 'war' while crimes against humanity did not necessarily require an armed attack. None of this is addressed in *Sakai.*

[12] Report, above n 5, 5. It may be that this was an alternative to convicting him for the crime against peace in respect of (some of) his activities in the mid-30s. On the other hand, it may be that the reference to the Chinese Criminal Code is to the provisions allowing for the trial and punishment of crimes against peace. The material is ambiguous. A domestic tribunal has the advantage over a typical international tribunal that it may well have competence to exercise jurisdiction not only over international crimes but also over domestic ones committed on the national territory. There are some nice questions that are finessed here about the extent of a combatant's privilege to kill in a messy situation like that in China in the 1930s. Was it a military occupation to which the rules of armed conflict apply to the exclusion of territorial law? Were the Japanese occupiers some early example of unlawful combatants subject to domestic law? Some wonderful questions, but not much enlightenment!

[13] As Piccigallo puts it: 'The court condemned Sakai to be shot. After ratification by Chiang Kai-Shek, the execution took place as scheduled, before a large, approving public audience.'

Piccigallo, above n 5, 165. Close your eyes, dear reader, and imagine the cheering throngs at the shooting.

[14] At least one German, Arthur Greiser, preceded him to conviction and public execution (that time by hanging) by a few weeks. See Mark Drumbl's contribution to this collection. (There must be a good article out there somewhere on the esthetics of shooting rather than hanging.)

[15] It was not the last Chinese trial including aggression. Using newspaper sources, Piccigallo, above n 5, 163–4, discusses at least two later Nanking prosecutions in which aggression was one of the charges, those of Generals Isogai (life imprisonment) and Tani (executed by hanging). I have not located any comprehensive account of the Chinese trials.

[16] The Sakai trial was concluded on 27 August 1946 (Summary Translation, above n 6, and Judgment, above n 7) or on the 29th (the Report, above n 5). It is not clear when it began, although

(II) What is the Crime of Aggression?

If the applicable Chinese Rules governing the Trial of War Criminals[17] contained a definition of crimes against peace, it is not reproduced in the Report. Instead, we learn that the Rules made some kind of reference to international law. The Notes on the case assert that the verdict on crimes against peace 'was made with regard, though without express reference, to rules which were explicitly formulated in the latest development of international law in this sphere'.[18] (How the 'regard' was made known is not established. None of the materials give any indication that the Tribunal referred to these documents.)[19] The Notes then quote three 'definitions' that would later be carefully considered in the ICC drafting exercise: those in the

paragraph 19 of the Attachment to the Judgment has a witness testifying on 11 June 1946. The Nuremberg verdict did not come until 1 October 1946. General MacArthur promulgated the Charter of the International Military Tribunal for the Far East (Tokyo Tribunal) on 19 January 1946; that trial began on 29 April 1946 but was not completed until November 1948. Paragraph 4 of the Attachment, in the context of the 1935 threats to attack Beijing and Tianjin, refers to evidence given before the Far East Tribunal on 9 July 1946 by a Major-General Tanaka. So the Nuremberg and Tokyo Charters were evidently available to the Chinese judges, as was some of the early evidence given in Tokyo. But the Nuremberg and Tokyo judgments were not. By the same token, Control Council Law No. 10 (CC Law No. 10), under which later American trials, one French trial, and a handful of Soviet trials took place, was promulgated on 20 December 1945 and is referred to in the Notes on the case in the published account of the Chinese decision, although it is not apparent what use the Chinese Tribunal itself made of CC Law No. 10, if any. The Report, the Summary Translation and the Judgment make no mention of the relevant Charters or CC Law No. 10, but the Report and the Summary do refer to Article 1 of the Nine-Power Treaty of 1922 and to Article 1 of the Pact of Paris 192 (Kellogg–Briand Pact). In the Nine-Power Treaty (Treaty Between the United States of America, Belgium, the British Empire, China, France, Italy, Japan, the Netherlands, and Portugal, signed at Washington, February 6, 1922) the Contracting Powers undertook in Article I(1) '[t]o respect the sovereignty, the independence, and the territorial and administrative integrity of China'. The Notes on the case, at 7, refer to these two treaties and point out that the Tribunal 'had thereby stressed' Sakai's guilt in taking part in 'a war in violation of international treaties'. None of the earlier British, US, Australian or Dutch trials that I have found included aggression (or later ones, for that matter), although the Australian law permitted such a charge. The Soviet Union had instituted war crimes trials against German military (and Soviet collaborators) beginning with the December 1943 Kharkov trial. See George Ginsburgs, *Moscow's Road to Nuremberg: The Soviet Background to the Trial* (Boston, MA and Leiden: Martinus Nijhoff, 1996), 52. While Soviet scholars had written since the 1930s about the criminality of aggression, it is not clear which of these early trials included that offence and I am aware of no trials conducted by other states that definitely included aggression before this one, other than the Polish prosecution of Greiser. Nonetheless, over the next few years the Soviet Union convicted a large number of German military for illegal activity that included crimes against peace. This is definitely an area begging for more research. Pioneering archival research is contained in Irina V. Bezborodova, *Generaly Vermakhta v plenu (Generals of the Wehrmacht in Captivity)* (Moscow: Rossiĭskiĭ gos. gumanitarnyĭ universitet, 1998), carefully reviewed in George Ginsburgs, 'Light Shed on the Story of Wehrmacht Generals in Soviet Captivity,' *Crim. L. Forum*,11 (2000),101–20.

[17] The Notes to the Report, at 3 n 1, after quoting part of the Rules, says that '[t]he above Rules were later replaced by a Law Governing the Trial of War Criminals of 24th October, 1946, an account of which will be found in the Annex to this Volume [Vol. 14 at 152]'. Since we are not given most of the text of either document, it is hard to know how they differ. On some apparent textual differences between the two sets of Rules, see below n 47.

[18] Report, above n 5, 3.

[19] Compare the explicit references to the Nine-Power Treaty and the Kellogg–Briand Pact, above n 16.

Nuremberg Charter, those in the Tokyo Charter and those in Control Council Law No. 10.[20]

The Nuremberg Charter reads:

> *Crimes against peace:* namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.[21]

The Tokyo Charter provides:

> *Crimes against peace:* namely, *the* planning, preparation, initiation or waging of a *declared or undeclared* war of aggression, or a war in violation of *international law*, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.[22]

Control Council Law No. 10, the second to last chronologically[23] (before Tokyo) is the most detailed of the three. It reads:

> *Crimes against peace: Initiation of invasions of other countries* and wars of aggression in violation of international *laws* and treaties, *including but not limited to* planning, preparation, initiation or waging of a war or aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.[24]

None of these instruments was as detailed in defining the crime as the Kampala amendments. Article 8 bis of the Kampala amendments, which defines aggression,

[20] The last of these gave rise to the second round of United States prosecutions in Nuremberg and to the French prosecution of Roechling. Unlike the Nuremberg trials, which did not permit an appeal, the French system did, luckily for Roechling. His conviction was reversed on appeal on the basis that 'his vanity perhaps allowed him to attribute more authority to himself than he was actually entitled to'. An embarrassing way to escape punishment! See the UN Secretariat's Historical review of developments relating to aggression, UN Doc. PCNICC/2002/WGCA/L. 1, 83.

[21] Nuremberg Charter, Article 6(a). Article 6 concludes with the following, applicable to all the Nuremberg crimes:

> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the forgoing crimes are responsible for all acts performed by any persons in execution of such plan.

It has always been a hard question who beyond leaders, organizers and instigators can be held responsible for aggression.

[22] Tokyo Charter, Article 5(A). Words in italics do not appear in the Nuremberg Charter. The words clarify that a declaration of war is irrelevant. They also contain a reference to international law (adding custom to treaties) that would in theory be helpful to the prosecution. In practice, the Kellogg–Briand Pact of 1928 provided the main legal source for prosecution at Nuremberg and Tokyo (and it may well be of *Sakai*).

[23] Above n 16.

[24] Control Council Law No. 10, Article II(1)(a). Words in italics are not in the Nuremberg Charter. The reference to 'invasions' finesses an argument that took place in the International Military Tribunal at Nuremberg and in the drafting of the Kampala amendments. The invasion of Austria, Bohemia and Moravia occurred as a result of threats rather than actual fighting (would such fighting be necessary for a 'war'?) and the Tribunal stopped short of calling those actions wars of aggression. CC Law No. 10 would encompass such actions, although no one was ultimately convicted on such a theory. (Prosecutions failed on the merits.) The mysterious meaning of 'war' was a major reason why the Kampala amendments avoided the use of that term, against the assertion that Nuremberg required that there be a war. CC Law No. 10 at least muddied those waters. CC Law No. 10 also included

makes a careful drafting distinction between a 'crime of aggression' and an 'act of aggression', the later being an element of the former. 'Crime of aggression', as defined in Kampala for the purpose of the Rome Statute, 'means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression[25] which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations'.[26] The definition goes on to explain 'act of aggression' in these words:

2. For the purpose of paragraph 1, 'act of aggression' means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
c) The blockade of the ports or coasts of a State by the armed forces of another State;
d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

the insidious drafting words 'including but not limited to'. There was a great deal of discussion in the drafting of the Kampala amendments about whether the list of 'acts' therein were the only ones that could amount to aggression—was the list, 'open', 'closed' or 'semi-closed'? The received wisdom is that the Kampala list is (semi-)open, but that any additions must be ejusdem generis with those named specifically.

[25] One major challenge with defining the crime of aggression since Nuremberg has been how to explicate the intricate relationship between what the aggressor state does (for which there is state responsibility) and what the individual actor does. The drafters of the Kampala amendments used a drafting convention under which what the state does is defined as an 'act of aggression' and what the individual does is the 'crime of aggression'. The definition of 'act of aggression' in the amendment is derived substantially from the General Assembly's famous Definition of Aggression, GA Res. 3314 (XXIX) of 14 December 1974, stripped of much of its indeterminacy. Resolution 3314 is, in turn, substantially derived from the Convention for the Definition of Aggression signed in London, 3 July 1933. During the drafting of the Nuremberg Charter, Justice Jackson endeavoured to incorporate some of the detail from this treaty, pointing out quite correctly that the Soviet Union was its main proponent. The USSR was not so keen, at that point, on something that could apply generally in the future. Thus the Nuremberg and Tokyo Charters took for granted that 'it' was what their adversaries did. See Roger S. Clark, 'Nuremberg and the Crime against Peace', *Wash. U. Global Stud. L. Rev.*, 6 (2007), 529–36.

[26] Article 8bis(1). Article 8bis represented the drafting work of the Court's Special Working Group on the Crime of Aggression (SWGCA), open to all states. Between 2003 and 2009 the SWGCA had picked up work begun before Rome and in the Preparatory Commission for the Court which functioned between 1998 and 2002. Article 8bis and its accompanying Elements of Crime (which spell out exactly what the prosecution must prove) were adopted with no change whatsoever in Kampala. The Group's Article 15bis, which dealt with the 'conditions' for the exercise of jurisdiction, was less refined and far more contentious. In the end, a somewhat different pair of Articles, 15bis and 15ter, emerged in Kampala. Article 15bis deals with complaints triggered by states or by the Prosecutor acting proprio motu; 15ter deals with Security Council referrals: Clark, above n 1.

e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.[27]

How consistent is this with the Sakai prosecution? I put aside for the moment the question whether Sakai fitted into an appropriate place in the structure of the Japanese Government. That is the subject of the next section of this chapter. For the moment, though, consider the ways in which the depredations in which he was engaged fit the (now detailed) categories that can constitute an 'act of aggression'. Consider Article 8bis (2), (a)–(g). At some points, there must have been an 'invasion[28] or attack by the armed forces of another State on the territory of another State'; a 'military occupation, however temporary, resulting from such invasion or attack'; an 'annexation by the use of force of the territory of another State or part thereof'; 'bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State'; a 'blockade of the ports or coasts of a State by the armed forces of another State'; an 'attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets

[27] One of the debates that took place during the drafting of the ICC provisions on aggression was whether the public law 'defences', such as self-defence of the state, authorization of the Security Council or (more controversially) humanitarian intervention, should be specifically included. Ultimately, they were not, the matter being left to be dealt with under the requirement that a breach of the Charter be 'manifest' and/or by the material dealing with defences in Article 31 of the Rome Statute. Due process requires that an accused be entitled to raise such issues. There was an interesting example of this in *Sakai*, best explained in the Summary Translation, above n 6. In respect of the events in the 1930s, the Summary states that the 'defendant pleaded on the grounds that when he demanded the withdrawal of Chinese troops from Hopei and the dismissal of Chinese Administrative Heads in Hopei, he acted within the stipulations of the Final Protocol of 1901'. (The Protocol represented the settlement with the 'Powers', including Japan, at the conclusion of the Boxer Rebellion.) The Tribunal responded, implicitly agreeing that the argument was one that might be made, but nonetheless dismissing it on the merits:

> [T]here is no stipulation in the Final Protocol of 1901 which prohibits the Chinese Government from stationing Chinese troops in Hopei and it does not give Japan the right to demand the dismissal of Chinese Administrative Heads in Hopei. The argument that the Exchange of Notes appended to the Protocol provides a limit of 20 li, separating the stationing of Japanese troops in Tientsin from Chinese troops, is untenable. It is clear that this plea is a deliberate mis-interpretation of the said Protocol.
>
> (Summary Translation, above n 6, 2.)

The Notes, at 5–6, discuss this argument as though it applied to charges of the breach of Chinese domestic law; I think it more likely from the context in the Summary and the judgment that it related to an aggression theory.

[28] Notice the reference to an 'invasion' in Article 8bis(2)(a), thus sidestepping the Austria/Bohemia/Moravia problem of lack of a 'war': see above n 24. Threats by Sakai to attack Beijing and Tianjin with artillery and air force led to the withdrawal of Chinese troops and effective control by Japan. Was this

of another State'; 'use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement';[29] and 'sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein'.

In short, every action except possibly item (f) on the list seems to be plainly involved. In fact, with a little creativity, even (f) is perhaps implicated in Japanese activities (although Sakai was not involved in all of them). Consider, for example, the invasion of Hong Kong and the drive south to Burma, Malaysia and Indonesia, some of which was conducted from the Chinese mainland—the only real issue is whether China had 'placed [the territory] at [Japan's] disposal' in any meaningful way.

To recapitulate, the actions of the Japanese State in China are encompassed by the Kampala definition of an 'act of aggression'. But what of Sakai's individual responsibility?

(III) Who can Commit the Crime of Aggression?

Sakai appears to have been convicted in some generalized reliance on the three 1940s sources of law reproduced above, on the theory that he was guilty of 'participating in the war of aggression'.[30] The note on the case asserts:

> In the Nuremberg Charter the range of persons liable to prosecution and punishment for crimes against peace is defined in the first and last paragraph of Article 6. It includes *any* person

similar to Goering's threat to bomb Prague off the map, followed by an incursion: an 'invasion' rather than a 'war'?

[29] Consider, in respect of this 'act', the creeping nature of the activities in which Sakai engaged, bearing in mind that 'consent' of some kind ('not real'?) was extracted from China from time to time.

[30] Report, above n 5, 2, 6. In summarily denying the accused's defence of superior orders, the Tribunal is also reported as saying: 'Granted that the defendant participated in the war on the orders of his Government, a superior order cannot be held to absolve the defendant from liability for the crime' (at 5). Participation' appears in the Nuremberg text both in the basic definition of aggression which includes also a separate inchoate crime of a 'common plan or conspiracy' to commit a crime against peace and also in the final paragraph of the definitional Article. In the latter, it relates to complicities and is applicable to all crimes. The basic definition of crimes against peace reads:

> namely the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

The final paragraph of Article 6 of the Nuremberg Charter deals generally with individual responsibility for each of the three Nuremberg crimes. It reads:

> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

implicated in its commission whether as an individual or a member of organisations, or as a leader, organiser, instigator or accomplice. The same follows from the Far Eastern Charter and Law No. 10.[31]

'The' war[32] rather begs the question about the events of the 1930s. What exactly was the nature of that conflict? There is, moreover, no discussion in the Report of why 'participating' is the appropriate verb (or why the notes on the case instead use the word 'implicated') or whether the theory was that he was part of a broad conspiracy. 'Participating' (or 'implicated') represents a pretty open-ended explanation of the conduct explaining who can commit the crime, and could catch those well down the food chain—although Sakai no doubt regarded himself as of some importance, as did his Chinese captors.[33] Would the language used be enough to encompass the sergeants and the foot soldiers as well as the top generals and cabinet ministers who were prosecuted at Tokyo?[34] The International Military Tribunal at Nuremberg tried to rein in the generality of the language[35] and the subsequent Nuremberg tribunals made some more efforts in this direction.[36]

Think back to the conduct words in the Kampala definition. A perpetrator must be involved in the 'planning, preparation, initiation or execution' of an act of aggression. Sakai, if he fitted this, was probably mostly on the 'execution' end of the list. I doubt that even a high level person who carries out someone else's policy, without more,

The discussion of the General's connection to the crimes of his subordinates did not add anything to our understanding of the rules for command responsibility. It did, however, flag the issues for later analysis. He was apparently charged on the basis that he 'incited' or 'permitted' his subordinates to commit the relevant war crimes and crimes against humanity (which were not precisely distinguished). Report, above n 5, 7. He defended on the basis that 'he could not be held responsible for the . . . violations because they were perpetrated by his subordinates and he had no knowledge of them' (at 7). His argument must have raised the nice question about what element of culpability applied to a commander. Was it a case for strict liability? Negligence? Recklessness? Knowledge? Intent? Rather than entering into a debate on the law, the Tribunal found against him on the facts: 'All the evidence goes to show that the defendant knew of the atrocities committed by his subordinates and deliberately let loose savagery upon civilians and prisoners of war' (at 7). Knowledge accompanied by deliberate inaction was evidently enough. Compare the standard for military leaders in Article 28 of the Rome Statute ('knew or should have known').

31 Report, above n 5, 4.

32 Above n 24.

33 The Summary Translation, above n 6, 2, describes Sakai as 'one of the leaders who came to China to carry out Japanese aggressive policy'. The Report, above n 5, 1, renders this as 'one of the leaders who were instrumental in Japan's aggression against China'. Yiqang Lin's translation of the judgment says 'he was one of those chiefly responsible for implementing the Japanese war of aggression.' The differences are subtle and the Report's version perhaps ascribes to Sakai a little more policy-making capacity than the others.

34 Article 5 of the Tokyo Charter limited jurisdiction of the Tribunal to 'the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace'. A judgment call had to be made by the prosecution and some of the accused had a tenuous connection to the aggression, yet all were ultimately convicted of it.

35 See generally, Clark, above n 25, 527.

36 See Kevin Jon Heller, 'Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression', *EJIL*, 18 (2007), 477.

makes the cut, today at least. The drafters of the amendments adopted in Kampala tried to refine a little further in their definition who might be guilty by adding a circumstance element[37] to the conduct one. To this end, the important language in their efforts is the requirement that the perpetrator be 'a person in a position effectively to exercise control over or to direct the political or military action of a State'.[38]

The crime of aggression is thus a 'leadership' crime, a proposition captured by the element that the perpetrator has to be in a position effectively to exercise control over or to direct the political or military action of a state. There was vigorous discussion in the work leading up to Kampala about how this applies to someone like an industrialist who is closely involved with the organization of the state but not formally part of its structure.[39] Some support was shown for clarifying the matter by choosing language closer to that used in the United States Military Tribunals at Nuremberg, namely 'shape and influence' the political or military action of a state, rather than 'exercise control over or to direct'.[40] Nevertheless, the quoted language remains in the Kampala amendments. Sakai does not appear from the material I have located to have been one who was able to 'shape and influence', let alone to 'exercise control over or to direct'. He apparently acted on someone else's policy decisions. Of course, one can see why the Chinese populace cheered at his execution—he was the hated person on the spot, not the remote one in Tokyo. I very much doubt, however, that he would have been convicted of a crime against peace had he lived to be indicted in the Tokyo Trial.

Perhaps it should be added that one can, in principle, be liable for most crimes either as a principal or as an accessory. It is fair to say that *Sakai*'s analysis runs together both the conduct words in the early part of the Nuremberg Charter's definition[41]—words which are most applicable to principals—and the accomplice language that is found in the latter part of Article 6 of the Nuremberg Charter.[42] This latter language applies on its face to all three Nuremberg offences, but fits a little awkwardly with aggression. If it really is a leadership crime, then it is more intellectually satisfying to characterize its perpetrators as principals rather than accomplices—the accomplice category applies more readily to underlings. It was

[37] The Elements of Crimes, echoing Article 30 of the Rome Statute, treat the material elements of a crime as being conduct, consequence or circumstance elements.

[38] Above n 25.

[39] See Heller, above n 36.

[40] See Informal Intersessional meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, from 11 to 14 June 2007, Doc. ICC-ASP/6/SWGCA/INF.1 (2007) at 3. Towards the end of the work of the Preparatory Commission for the Court, Samoa made a proposal for the Elements of Aggression which included a statement that the perpetrator 'need not formally be a member of the government or military' but the group thought it unnecessary to spell this out. See Elements of Crime of Aggression—Proposal Submitted by Samoa, UN Doc. PCNICC/2002/WGCA/DP.2. On 'shape and influence' as the standard in the Tokyo Trial, see Neil Boister & Robert Cryer, *The Tokyo International Tribunal: A Reappraisal* (Oxford: Oxford University Press, 2008), 151–3.

[41] Above n 21.

[42] American federal law, and the law of some states, has two concepts of conspiracy, one as an inchoate crime, and one as a mode of complicity. The inchoate version was apparently what was contemplated in Article 6(a) of the Nuremberg Charter, above n 21; 'common plan or conspiracy' also found its way into the concluding (complicity) words of Article 6 about leaders and organizers and the rest.

thoughts such as these that led in the Kampala negotiations not only to the definition of the crime which is found in Article 8bis, but also to an amendment to Article 25 of the Rome Statute. Article 25(3), found in the general part of the Rome Statute, deals with the various ways in which primary and secondary parties can be associated with an offence. Relatively early drafts of the aggression amendments simply excluded the application of Article 25(3), *in toto*,[43] but some of the participants in the negotiation thought that this went too far and insisted on language designed to assert the leadership point again (perhaps from an abundance of caution)[44] and at the same time leave open the possibility that the Court might find it useful to divine some residual possibilities in the Article for those close to the centres of power.

At all events, it is difficult to argue with the comments made by Lord Wright, Chairman of the United Nations War Crimes Commission, in the Foreword to the second of the two volumes containing a report of the Sakai trial:

> [The case] included charges of crimes against peace as well as war crimes and crimes against humanity. I need only comment on the first of these charges: the main current of thought and decisions on crimes against peace which have been given since the end of the war have been that such crimes can only be committed as a matter of legal principle by accused individuals who may be described as acting on the policy-making level. In this particular case, however, it is difficult to see that the accused came with that category. I do not think that this decision can be relied on as substantially affecting the general current authority on this matter.[45]

One has thus to leave the issue of 'who can' with an expression of extreme doubt. Without knowing more about where he fitted in the Japanese hierarchy, is most unlikely that Sakai would be guilty of aggression under the Kampala definition. He was just not close enough to the centre of power as expressed there.

[43] See final Discussion paper by the Coordinator on the Crime of Aggression at the Preparatory Commission for the Court, UN Doc. PCNICC//2002/WGCA/RT.1/Rev. 2 (2002). This drafting model had been carried over from the work of the ILC which had not really addressed itself to general part issues and aggression. At this point, it was widely assumed that the aggression definition would stand on its own (later called a 'monist' approach) without reference to the general provisions on criminal responsibility in Part 3 of the Statute. In the Rome process from late 1995 onwards there was an understanding that there would be heavy reliance for definitions of responsibility in respect of genocide, war crimes and crime against humanity, on a general part as well as on the provisions on specific crimes, but this was not carried forward into the drafting of the provision on aggression, I think by oversight. Later in the negotiations, it was agreed that the drafting should follow the model of the other three crimes and rely on the general part—a default rule that could be set aside where appropriate. This drafting approach came to be known as the 'differentiated' approach.

[44] Para 3bis is added to Article 25, paragraph 3 of the Statute which deals with individual responsibility:

> In respect of the crime of aggression, the provisions of this Article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

[45] *Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission*. Vol. XIV (1949) at x–xi. Lord Wright added that 'there was abundant evidence against the accused of peculiarly atrocious offences in the nature of war crimes and crimes against humanity which would have justified the sentence'. The Attachment to the Judgment (above n 7) confirms this.

(IV) Jurisdiction

Jurisdiction is a fundamental issue of international criminal law. I think that if an officious bystander had asked the members of the Tribunal that tried Sakai where it got its competence/jurisdiction from, it would have answered that its competence came (immediately at least) from the Chinese Rules governing the trial of war criminals.[46] As a matter of positive law, it would probably have referred to Article I of the Rules in force at the time:

> In the trial and punishment of war criminals, in addition to rules of international law, the present Rules shall be applied; in cases not covered by the present Rules, the Criminal Code of the Chinese Republic shall be applied.
>
> In applying the Criminal Code of the Chinese Republic, the Special Law shall as far as possible be applied, irrespective of the status of the delinquent.[47]

Now, if one probes a little deeper, the Tribunal might add that there are various ways in which one might state questions of jurisdiction, especially in terms of jurisdiction to prescribe (that is to apply one's laws to the situation) and in terms of jurisdiction to enforce (that is to apply the law to this particular person). It will be noted that China apparently domesticated the Nuremberg/Tokyo crimes in some fashion (as a matter of substantive law) but left open the application of other rules of existing domestic criminal law (both the general and the special parts) as needed. What might be the Tribunal's specific theory when it came to applying international law, the details of which were apparently not spelled out in the legislation?

[46] China was going through a revolutionary upheaval at the time. I am not sure how this legislation was promulgated, but all concerned appear to have accepted it as legitimate under the domestic system at the relevant time. The Tribunal was obviously created after the event, but the Nuremberg and Tokyo decisions would argue that the substantive law already existed, as treaty or customary law, and that there was no *ex post facto* problem with setting up a mechanism for trial in such circumstances. Some twenty-first century sensitivities would be more squeamish about the military aspects of the trial.

[47] Language of rule as quoted in the report. An Annex to Vol. XIV of the UN War Crimes Commission Reports contains a lengthy discussion of a successor law, Law governing the Trial of War Criminals, of 24 October 1946 (United Nations Day—coincidence or deliberate?). Unfortunately, neither of the actual texts (or a translation thereof) is reproduced and I do not have access to a complete text of either. Thus it is not clear to me whether the definition of crimes (other than those crimes already contained in the Chinese code) had any specific detail or whether it relied simply on the reference to 'international law' quoted above, which could be interpreted as incorporating the Nuremberg and Tokyo Charters by reference. The Rules adopted later in 1946, as discussed in the Annex, are quoted as containing essentially the same language but also as having the following content on crimes against peace (not explicitly so labelled):

> A person who commits an offence which falls in any one of the following categories shall be considered a war criminal:
>
> 1. Alien combatants or non-combatants who, prior to or during the war, violate an International Treaty, International Convention or International Guarantee by planning, conspiring for, preparing to start or supporting, an aggression against the Republic of China, or doing the same in an unlawful war.
>
> [There follows a general reference to other crimes: to violations of the 'Laws and Usages of War', to assorted crimes that would fit the crimes against humanity category (including a China-specific item of 'distributing, spreading, or forcing people to consume, narcotic drugs or forcing them to cultivate plants for making such drugs') and another general reference to 'Chinese Criminal Law'.]

Was it simply a domestic tribunal exercising jurisdiction over what happened in the territory on an effects, passive personality or protective theory?[48] Or is it to be regarded as a tribunal acting for the international community, exercising some sort of universal jurisdiction?

These thoughts flow inevitably into an examination of some of the arguments that have arisen concerning the ICC and the extent to which international law contemplates domestic jurisdiction in respect of the crime of aggression. One aspect of the terms of this debate is to look at how aggression and the fundamental principle of complementarity enshrined in the Rome Statute work together. This matter received some, albeit cursory, examination during the life of the SWGCA, whose work product paved the way for the Kampala amendments on aggression.[49] Recalling that discussion is a good way into an appreciation of the issues. The discussion occurred in the context of the application of the concept of complementarity to the crime of aggression. Complementarity in the Rome Statute is the fundamental principle that deals with the implications of the proposition that there is concurrent jurisdiction as between a national jurisdiction, or set of national jurisdictions, and the ICC itself.

Article 17 of the Rome Statute teases out the basic rule of complementarity as one of 'admissibility'. It provides, in relevant part, that:

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3.[50]

[48] Note that what Sakai did was mostly done with him located in China (or Hong Kong). Some Japanese aggressors (including many of those tried in Tokyo) never set foot on Chinese soil. As to them, a territorial theory would have to be based on an 'effects' or 'objective territorial' analysis: above n 3. The 24 October 1946 Law, above n 47, required that a defendant be an 'alien combatant or non-combatant' but was silent on where the perpetrators had to be at relevant times. Local collaborators apparently would be (and were) prosecuted under local law. There is no reason in principle why a high-level collaborator, located in and a national of a country that is occupied with his assistance, could not be guilty for, say, aiding and abetting the aggression, but I suppose that treason or some similar crime would always be enough to trigger appropriate punishment.

[49] Report of the inter-sessional meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at Princeton University, New Jersey, United States, from 21 to 23 June 2004, Doc. ICC-ASP/3/25 (2004) (concluding that relevant Articles of Rome Statute on complementarity could be applied to crimes of aggression without modification).

[50] Rome Statute of the International Criminal Court, Article 17(1). Paragraph 1 concludes with '(d) The case is not of sufficient gravity to justify further action by the Court.' This appears to be an issue

Two essential issues remain to be decided, probably by the Court in due course: (1) what is meant by 'a State which has jurisdiction'? (2) Does this include a state acting on the basis of a universal jurisdiction theory?

A key phrase in both subparagraph (a) and subparagraph (b) is thus 'a State which has jurisdiction over it'.[51] There are three possible 'states' to which this might refer: an aggressor state; a victim state[52] and a third (or 'bystander') state. 'Has' is perhaps interesting here. It must refer to the ground level requirement that the national law of the relevant state authorizes the prosecution and adjudication of the case[53]

of admissibility that, unlike the three preceding subparagraphs quoted above, is distinct from complementarity. Paragraphs 2 and 3 of Article 17 define 'unwillingness' and 'inability'. Article 20(3), on *ne bis in idem*, referred to in para 1(c) above, precludes trial in the ICC of a person tried in another court for the same conduct, unless the other proceedings were (a) for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the ICC, or (b) were otherwise not conducted independently and impartially or in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice. On complementarity in general, see especially Mohamed M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Boston, MA and Leiden: Martinus Nijhoff, 2008).

[51] Article 19(2)(b), using similar language, permits a challenge to jurisdiction or admissibility by 'a State which has jurisdiction over a case'. Article 18(1), which deals with preliminary rulings regarding admissibility, uses slightly different language. It requires the Prosecutor at an early stage to 'notify all States Parties and *those States which*, taking into account the information available, *would normally exercise jurisdiction over the crimes concern*ed.' (Emphasis added.) Paragraph 2 of Article 18 states that, within a month 'a State may inform the Court that it is investigating or has investigated its nationals or *others within its jurisdiction* with respect to criminal acts which may constitute crimes referred to in Article 5…' (Emphasis added.) 'Would normally exercise' (Article 18(1)) is perhaps a nod in the direction of territorial or nationality jurisdiction; 'within its jurisdiction' (Article 18(2)) is neutral.

[52] As a practical matter, absent a successful extradition request (made almost certainly to a third state to which the alleged perpetrator had travelled), a victim state would probably have not only to fend off the aggression but also get its hands on the perpetrators by advancing to the aggressor's capital or capturing leading military in the field. See Nicolaos Strapatsas, 'Complementarity and Aggression: A Ticking Time Bomb', in C. Stahn and L. van den Herik (eds), *Future Perspectives on International Criminal Justice* (The Hague: TMC Asser Press, 2009), 460. I know not how China obtained custody of Sakai, who seems to have been enjoying his retirement back in Japan from late 1943. Somebody, presumably the occupation authorities, must have handed him over. (His 'residence' is described in the Summary Translation and the Judgment as 'Tokyo'.) At its First Session earlier in 1946, the UN General Assembly adopted GA Res. 3 (I) of 13 February 1946, in which the Assembly:

> Recommends that members of the United Nations forthwith take all the necessary measures to cause the arrest of those war criminals who have been responsible for or have taken a consenting part in [war crimes, crimes against humanity and crimes against peace], and to cause them to be sent back to the countries in which their abominable deeds were done, in order that they may be judged and punished according to the laws of those countries.

This language echoes that in the October 1943 'Statement on Atrocities' made by Roosevelt, Churchill and Stalin concerning punishment of responsible Germans. (The drafting was largely Churchill's.) China participated in the 1943 'Four Nation' meeting in Moscow, but there was no similar statement on Japanese atrocities then. China was also an active member of the United Nations War Crimes Commission which, no doubt, helps explain why *Sakai* is one of the cases selected for publication. But why this and not others?

[53] This will almost certainly be pursuant to legislation criminalizing aggression in the particular jurisdiction. The decision of the House of Lords in *R v Jones* [2006] UKHL 16 is suggestive of the way in which national courts approach such problems. Just before hostilities began in the Second Gulf War in 2003, several people entered military bases in the United Kingdom, committing damage in an endeavour to disrupt preparations for war. Charged with offences including criminal damage, aggravated trespass and attempted arson, they sought to justify their actions on the basis that the

and to an absence of procedural obstacles to domestic prosecution.[54] But does it also include some concept of the legitimacy of the exercise of jurisdiction by reference either to some considerations in the Statute itself or to some questions of general international law? For the purposes of complementarity in this respect there does not appear to be anything 'special' about aggression concerning aggressor state or victim state jurisdiction. They are relatively straightforward examples of states having nationality and territorial (or perhaps 'protective') jurisdiction.[55] The more difficult case is that of universal jurisdiction by a bystander state. Two questions arise: (1) Does Article 17 even contemplate that the Court might defer to a bystander state on complementarity grounds? (2) Is aggression the subject of

pending actions by the US and UK Governments would amount to the crime of aggression. They might therefore, they argued, lawfully use force in an attempt to prevent that offence from taking place. The House held that, while aggression was recognized in customary international law as a crime, it was not a crime in English law absent action by the legislature. The power that English courts once had to create common law crimes no longer existed. See Roger S. Clark, 'Aggression: A Crime Under Domestic law?' *NZLJ*, [2006], 349. The House of Lords does not offer any thoughts about universal jurisdiction here—given the procedural stance in *Jones*, the relevant criminal activities would have been taking place in England. Jurisdiction would have been based on territoriality.

[54] Pål Wrange comments:

> At the domestic level, there would be certain difficulties, such as the question of immunities of foreign leaders. Procedural immunity is enjoyed by some types of officials as long as they hold office, and it will prevent a State from prosecuting, even for international crimes (International Court of Justice (ICJ), *Arrest Warrant case*). While immunity does not apply before the International Criminal Court, the renunciation of immunity inter partes in the Rome Statute probably does not have effect on domestic prosecutions. Domestic prosecutions might also apply national immunities protecting officials from prosecutions before their *own* courts. Such domestic immunity would however not be a valid excuse to not prosecute cases falling under the Rome Statute.

Pål Wrange, 'The principle of complementarity under the Rome Statute and its interplay with the crime of aggression', in summary of Conference on International Criminal Justice held in Turin, Italy, 14–18 May 2007, Doc. ICC-ASP/6/INF.2 at 37 (2007). See also Wrange's discussion of potential problems of 'act of State' and 'executive privilege'. The reference to the Arrest Warrant or 'Yerodia' case is to *Case Concerning the Arrest Warrant of 11 April 2000 (D.R. Congo v Belgium),* 2002 ICJ, which contains an extensive discussion of the jurisdictional and immunity issues involved in prosecuting foreign leaders. If there is immunity, there is an inability to prosecute nationally and the case should go to the ICC where immunities do not apply (Article 27 of the Rome Statute). Such problems afflict prosecutions in aggressor states, victim states and universal state jurisdictions, but perhaps not equally. In the aggressor state, it is at least possible that the immunity problems will have been removed in Rome Statute implementation legislation. That is, however, (absent a change of regime) the place where prosecution is least likely to occur. In the victim state or a third state, there will be the problem of whether one formerly eligible for immunity ratione personae as a head of state or senior official continues to have immunity ratione materiae after leaving office for involving the state in an act of aggression. The Pinochet case in the UK stands as authority for the proposition that there are some activities like torture that are not part of a leader's function for the purposes of producing immunity. It is not clear whether this is consistent with dicta of the ICJ in the Yerodia Case and with the direction in which the ILC is proceeding Immunity of State officials from Foreign Criminal Jurisdiction. See generally, Roman A. Kolodkin, Special Rapporteur, Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction, UN Doc. A/CN.4/631 (2010). These authorities suggest that at least some examples of immunity ratione materiae continue to apply after the actor leaves office. Sakai made a plea based on superior orders but does not seem to have argued that he had immunity (either before or after his 1943 retirement).

[55] The SWGCA discussed theories of jurisdiction not in the context of Article 17 but in the context of Article 12 of the Rome Statute. Article 12 requires, as a 'precondition' to the Court's exercise of jurisdiction, that either the territorial state or the state of nationality be a party to the Statute. What

universal jurisdiction under customary law? The first question applies to all of the crimes within the jurisdiction of the Court; the second is specific to aggression.

(1) Does a 'State which has jurisdiction' include one claiming universal jurisdiction?

As to the first question on how Article 17's 'has jurisdiction' should be interpreted on universal jurisdiction, the position is frankly mysterious. One might have thought that the issue would be the subject of some useful preparatory work somewhere. If there is, it has not come to my attention. The author represented the Government of Samoa in the negotiations in New York and Rome leading to conclusion of the Statute. He asked on several occasions for an explanation about whether complementarity applied to a state contemplating acting on a basis of universal jurisdiction. He does not recall ever having received a useful answer. The subsequent literature is surprisingly sparse.[56] For example, in the leading commentary of the Statute edited

of a situation where a victim state (where the effects of the aggression were apparent) is a party but the aggressor state (where all the preparations took place) is not? There was wide support in the Special Working Group for the proposition that the victim state's acceptance should be sufficient to meet he requirements of Article 12. One of the SWGCA's Reports commented:

> Given that the conduct of a leader responsible for the crime of aggression would typically occur on the territory of the aggressor States, the question was raised whether the crime could also be considered to be committed where its consequences were felt, namely on the territory of the victim State. The answer to that question had important consequences for the application of article 12, paragraph 2 (a), which linked the Court's jurisdiction to 'the State on the territory of which the conduct in question occurred'. Broad support was expressed for the view that concurrent jurisdiction arises where the perpetrator acts in one State and the consequences are felt in another, while some delegations required more time to consider the issue. While some delegations expressed the possible need for clarifying language, possibly in the elements of crime, several stated that the Rome Statute was sufficiently clear and that 'over-legislating' should be avoided. The reference to 'conduct' in article 12 encompassed also the consequences of the conduct. The decision in the *Lotus* case supported this reasoning.

Report of the Special Working Group on the Crime of Aggression, ICC-ASP/7/SWGCA/1 (26 November 2008). Compare possible different inferences from the work of the ILC, below n 77. The reference to *Lotus* is, of course, a reference to *The SS Lotus (France v Turkey),* (1927) PCIJ, Ser. A, No. 10, at 4 (negligence on board French ship leading to deaths on Turkish ship—Turkey has jurisdiction, concurrent with France, at least on basis of the effects on Turkish territory but perhaps not on a passive personality theory). The Special Working Group's result was rejected, although the logic of its reasoning was perhaps underscored in Article 15bis (5) of the Kampala Amendments, above n 1. It asserts that '[i]n respect of a State that is not party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.' The implications of *Lotus* are avoided by the treaty language.

[56] The issue does not appear to be discussed in El Zeidy, above n 50, the leading work on complementarity. Nor is it mentioned in the account of the negotiations by John Holmes, the Canadian diplomat who chaired the Article 17 discussions at the Preparatory Committee in New York and then in Rome, John Holmes, 'The Principle of Complementarity', in Roy Lee (ed), *The Making of the Rome Statute, Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999), 41. His main concern in the negotiations was that states would need to legislate in order to 'have' jurisdiction. He says, at 67:

> It was not enough that a State had instituted national proceedings, it must establish to the Court that it had jurisdiction in such a case. This addition was intended to forestall situations where a State could challenge (and delay) the Court from proceedings on the ground that

by Otto Triffterer, the authors of neither the commentary on Article 17[57] nor that on Article 18,[58] address the issue. On the other hand, the late Christopher Hall, the author of the commentary of Article 19, discusses 'State which has jurisdiction over a case'[59] in these words:

> Since all States under international law may exercise universal jurisdiction over the crimes within the Court's jurisdiction, it is likely that paragraph 2(b) meant only to include those States which had provided their own courts with jurisdiction under national law over the case under the relevant principle of jurisdiction, whether based on territory, the protective principle, the nationality of the suspect or the victim or universality.[60]

The assumption here is that complementarity applies to situations in which it is appropriate to exercise universal jurisdiction (assuming the necessary legislation is in

> it was investigating when in fact the investigation was sure to fail because the State lacked jurisdiction even as far as its own courts were concerned.

In a later book chapter, Holmes comments:

> Of course, in reality there is a need for the ICC, since States may be unwilling to exercise jurisdiction over international crimes, despite a duty to do so, especially when the nexus between the State and the crime is limited. Universal jurisdiction exists with respect to many of the crimes included in the Statute, but States have been reluctant to exercise it.

J.T. Holmes, 'Complementarity: National Courts versus the ICC', in A. Cassese, P. Gaeta & J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002). This can be read as assuming that complementarity applies to universal jurisdiction, but as saying nothing about whether aggression is one of the 'many' over which there is universal jurisdiction.

57 Sharon A. Williams and William A. Schabas, 'Article 17, Issues of Admissibility', in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court—Observers' Notes, Article by Article* (Oxford: Hart Publishing, 2nd edn, 2008), 605.

58 Daniel D. Ntanda Nsereko, 'Article 18, Preliminary Rulings regarding Admissibility', Triffterer, above n 57, 627. Judge Nsereko's discussion of the notification requirement in Article 18(1) underscores that complementarity issues can arise both in respect of state parties to the Statute and non-parties.

59 The issue here is who might make a challenge to admissibility. Can a 'volunteer' make such a claim? It will be noted that there are actually two issues not resolved by the language of Article 19. Does a volunteer have 'standing' to raise the admissibility issue and insist that it wants to proceed; what are the criteria by which the Court will determine whether to accede to its claim as a matter of 'substance' or not?

60 Christopher K. Hall, 'Challenges to the jurisdiction of the Court or the admissibility of a case', above n 57, 649. Hall's references are perhaps telling. He writes:

> There have been three comprehensive global studies that have described state practice concerning universal jurisdiction over crimes under international law.

See 'Harvard Research in International Law,' *Am. J. Int'l L. Supp.,* 29 (1935), 435; Amnesty International, *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation* (Sep. 2001, AI Index: IOR 53/022—018/2001) (Second Edition forthcoming); J.-M. Henckaerts/L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1, 604–7; Vol. 2, 3383–940 (2005).

None of these sources deals with the crime of aggression—while at least the later ones support universal jurisdiction for breaches of humanitarian law, it is not clear how far they go to support Hall's proposition that all states 'may exercise jurisdiction over the crimes within the Court's jurisdiction'. Hall was one of the authors of the Amnesty International study that he cites; it contains nothing indicating that there is universal jurisdiction over aggression—the word is barely mentioned and then only in passing. Amnesty was, indeed, one of a handful of major non-governmental organizations (NGOs) that was singularly unsupportive of the effort to complete the left-over mandate from Rome on aggression.

place). The same assumption appears in an important article by Professor Darryl Robinson,[61] a member of the Canadian delegation leading up to and in Rome who describes himself as 'the drafter of the text that became Article 17'.[62] That Robinson believes that 'a State which has jurisdiction' includes one operating on the basis of universality appears from his interesting discussion of 'burden-sharing' between the ICC and national courts. He invites the reader to:

> Consider the scenario of a 'third State'. The ICC has investigated a situation, and one of the persons most responsible has fled to a third State. Although the third State could initiate its own proceedings (for example under universal jurisdiction), and indeed the State would have the right to do so under complementarity, the ICC and the third State may agree that the ICC is the most efficient and effective forum to prosecute that person, because it has already amassed the necessary evidence.[63]

Neither the Hall comment,[64] nor that by Robinson,[65] addresses specifically the second question, to which we now turn, whether universal jurisdiction is appropriate *for aggression.*

(2) Is universal jurisdiction over aggression recognized in contemporary international law?

As to the question of the propriety of exercising universal jurisdiction over another State's aggression there is fairly widespread agreement that aggression is a crime under international law.[66] But does that translate into a crime for which there is universal jurisdiction? It is very doubtful that under current customary law it can be asserted unequivocally that aggression 'is' subject to universal jurisdiction.[67] The (mostly) non-governmental authors of the *Princeton Principles on*

[61] Darryl Robinson, 'The Mysterious Mysteriousness of Complementarity,' *Crim. L. Forum*, 21 (2010), 67. Robinson is at pains to correct a (common) misconception of Article 17, namely that the main issue is whether a state is 'able and willing'. From the plain meaning of Article 17, it is apparent that the basic rule is that a case is admissible whenever there are no domestic proceedings taking place. It is only when there are such proceedings that it is necessary to go to the second prong, that is whether the state in question is able and willing to investigate or prosecute genuinely. Many commentators see the 'able and willing issue' as the primary one, rather than the 'is being' or 'has been' one.

[62] Robinson, above n 61, 68.

[63] Robinson, above n 61, 97. This excellent hypothetical was floated earlier, but without the reference to universal jurisdiction, in a 2003 Informal Expert Paper, *The Principle of Complementarity in Practice*, produced for the ICC Office of the Prosecutor by a distinguished group coordinated by Professor Robinson, found at <http://www.icc-cpi.int/iccdocs/doc/doc654724.pdf> (accessed 25 February 2013).

[64] Above n 60. [65] Above n 61.

[66] Podgor and Clark, above n 3, 160–1; *R. v Jones*, above n 53.

[67] Something could, in principle, be a crime under international law without that necessarily carrying with it a right to exercise universal jurisdiction. It may entail simply an obligation to penalize it at the national level or only a right to do so. The sixth preambular paragraph to the Rome Statute of the International Criminal Court reads:

> *Recalling* that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes, . . .

> Writing shortly after Rome, Slade and Clark said this about the paragraph:

> It is delightfully ambiguous. Does the State obligation of which it speaks 'to exercise its criminal jurisdiction over those responsible for international crimes' refer to jurisdiction

Universal Jurisdiction contend that there is universal jurisdiction over a person 'duly accused of committing serious crimes under international law'.[68] 'For the purposes of these Principles', they contend, 'serious crimes under international law include: (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture'.[69] Yet one has to have some doubts about how far the inclusion of crimes against peace in this list is supported by State practice. Other authorities are much more equivocal.[70] Putting aside *Sakai* and the other cases brought in victim states,[71] the only prosecutions clearly for the crime against peace were those under the Nuremberg and Tokyo Charters and under Control Council Law No. 10 in the 1940s and these were before tribunals best described as 'international' or 'victor's' (or both). I know of no disinterested third-party prosecution for aggression. On the other hand, Astrid Reisinger Coracini's careful research has located what she describes as 'statutory provisions relating to aggression as a crime under international law in some twenty-five countries, predominantly Eastern European and Central Asian States'.[72] Some, but by no means all, of those twenty-five (and there may be a few others) contemplate universal jurisdiction.[73] But as practice, this is pretty thin!

Then there is the work of the International Law Commission on the Draft Code of Crimes against the Peace and Security of Mankind, commencing in the 1940s and concluding in 1996.[74] The work had proceeded on the basis that the

> over crimes within the territorial 'jurisdiction' of the State? Or is it referring to a much broader 'jurisdiction' of the 'universal' kind, regardless of where the events occurred? In this respect, perhaps, it perhaps reflects the ambiguity of some negotiators about whether the International Court should derive its jurisdiction on some theory of universal jurisdiction or whether it should be narrower, based on the consent of the territorial State or the State of nationality.

Tuiloma Neroni Slade and Roger S. Clark, 'Preamble and Final Clauses', in Lee, above n 56, 427.

[68] Princeton Project on Universal Jurisdiction, *The Princeton Principles on Universal Jurisdiction* (2001), principle 1(2). Principle 3 asserts that with respect to serious crimes under international law 'national judicial organs may rely on universal jurisdiction even if their national legislation does not specifically provide for it'. There appears to be no existing example of such reliance. If *Sakai* turns on a universal theory, the tribunal has its empowering legislation to rely upon.

[69] Princeton Project on Universal Jurisdiction, above n 68, principle 2(1).

[70] I could find no reference to aggression in the most important recent study of universal jurisdiction, Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford: Oxford University Press, 2003). Cedric Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press, 2008) has a very erudite discussion of the universality principle at 100–26 in which he discusses numerous candidates for universal jurisdiction, especially over what he calls 'core crimes'—but aggression does not even make it into the discussion. See also Holmes's opinions, above n 56.

[71] Above n 16.

[72] Astrid Reisinger Coracini, 'Evaluating domestic legislation on the customary crime of aggression under the Rome Statute's complementarity regime,' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Boston, MA and Leiden: Martinus Nijhoff, 2008), 734 (footnote omitted).

[73] In a note to the author, Dr. Reisinger Coracini said that almost all those with legislation espoused at minimum a territorial theory of jurisdiction. She added that universal jurisdiction appeared to be asserted by, at least, Bulgaria, Croatia, Hungary (but in respect of incitement only) and Moldova. Others, like Armenia, Bosnia, Estonia, Georgia and Kazakhstan, adopt some kind of passive personality or protective principle which supports victim state jurisdiction.

[74] Draft Code of Crimes against the Peace and Security of Mankind, *Yearbook of the International Law Commission*, 1996, Vol. II (Part Two). For some history of the Draft Code, see Timothy L.H.

Nuremberg and Tokyo crimes—war crimes, crimes against humanity and crimes against peace—were part of a more general category, the details of which would emerge from rational analysis. That hope ultimately proved illusory and the work-product in 1996 included essentially the Nuremberg crimes, amplified by the addition of genocide, which had emerged from crimes against humanity, and crimes against United Nations and associated personnel. Article 16 of the Draft Code notes[75] the crime of aggression; Article 17 the crime of genocide; Article 18 crimes against humanity; Article 19 crimes against United Nations and associated personnel; and Article 20 war crimes. For present purposes, the interesting issue is the jurisdictional theories addressed by the Commission. Article 8, entitled 'Establishment of jurisdiction', provides:

> Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17, 18, 19 and 20, irrespective of where or by whom those crimes were committed. Jurisdiction over the crime set out in article 16 shall rest with an international court. However, a State referred to in article 16 is not precluded from trying its nationals for the crime set out in that article.[76]

Notably absent is any reference to a requirement for the exercise of universal jurisdiction over the crime of aggression. The International Law Commission's (ILC's) draft can thus be read as an assertion that general international law supports universal jurisdiction for the other crimes to which the Draft Code refers, but that aggression is different—jurisdiction rests there with an international court or the courts of the aggressor state. Indeed, by implication, the ILC even casts doubt on whether there is jurisdiction in the courts of the victim State.[77]

McCormack & Gerry J. Simpson, 'The International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind: An Appraisal of the Substantive Provisions,' *Criminal Law Forum*, 5 (1994), 1; Rosemary Rayfuse, 'The Draft Code of Crimes against the Peace and Security of Mankind: Eating Disorders at the International Law Commission,' *Criminal Law Forum*, 8 (1997), 43. The exclusion of universal jurisdiction over aggression is especially telling in the context of the ILC's concurrent work on state responsibility. In its commentary on the obligations of states arising from a breach of a peremptory norm, the Commission notes widespread agreement that peremptory norms (*jus cogens*) extend at least to the prohibitions of aggression, slavery and the slave trade, genocide, racial discrimination and apartheid. See James Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge: Cambridge University Press, 2002), 284. *Jus cogens* norms are often equated with those over which there is universal criminal jurisdiction for the individuals responsible, but the ILC, certainly in relation to aggression, did not make that precise connection.

[75] The 1996 Draft Code makes no serious attempt to 'define' in any detail either the specific offences or the general part of the Code.

[76] The 1996 Draft Code, Article 8. See also Article 9, which proceeds on a similar basis of distinction: 'Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in article 17, 18, 19 or 20 is found shall extradite or prosecute that individual.' The discussion of these Articles by the ILC in *Yearbook of the International Law Commission*, 1996, Vol. I at 49–53, supports the present author's caution about universal jurisdiction for aggression.

[77] Cf. the comments in the Special Working Group on the Crime of Aggression, above n 55. The matter was not without controversy in the ILC. In the final discussion of the jurisdictional issues there, the Special Rapporteur on the Draft Code commented:

> [T]he text clearly raised a number of problems. Mr Kabatsi had proposed that a court of the country of the author of the crime of aggression should be considered competent. In that

The United States did not participate in the work of the SWGCA. However, it sent a large delegation to the final meetings of the Assembly of States Parties that took place before the Review Conference, expressing doubts there and in a number of informal meetings early in 2010 about the jurisdictional principles applicable to the crime of aggression. It pursued the matter in Kampala. At its insistence, the following paragraphs were asserted in the 'understandings' annexed to the resolution adopting the aggression amendments, beneath the heading 'Domestic jurisdiction over the crime of aggression':

> 4. It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.
>
> 5. It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.[78]

Paragraph 4 can hardly be regarded as saying anything more than Article 10 of the Rome Statute says about leaving principles of international customary law free to develop for purposes other than the Statute. (This is not to say that the Statute does not, inevitably, contribute to the development of customary law. Believing to the contrary is like believing that King Canute could really order the waves back.) It is perhaps best understood as an effort to insist on the hardly earth-shattering proposition that, whatever customary law is on the meaning of 'act of aggression' and 'crime of aggression', it might not be exactly the same as in the 2010 amendment. Paragraph 5 is likely to have more practical effect. It is plainly aimed at discouraging states from exercising jurisdiction over the crime of aggression based on universal jurisdiction, and possibly even on the basis of being a victim State.[79] It is, however, hardly a forceful proposition about the right to exercise these jurisdictions, other than to assert that the right does not rest on the amendments—it has presumably to be found in existing customary law.

> case, why not a court in the victim country? Given the large number of proposals made, the Commission was in danger of adopting an unsatisfactory provision if it was too hasty in its decisions. A small informal group should look into the question.

Yearbook of the International Law Commission, 1996, Vol. I, at 50 (summary records). Nothing further happened on the record other than the final adoption of the text as described above. Strapatsas, above n 52, 454–455, points out that there is some post-World War II practice of states, such as Australia, China, Denmark, Greece, Poland and the United States (with regard to the Pacific theatre of war) claiming jurisdiction on the basis of being a victim state and, in the case of China [Sakai] and Poland [Greiser and Koch], actually exercising it. He gives short shrift to the argument that there is no victim state jurisdiction. (See also the practice of the USSR in respect of German generals, above n 16.)

[78] Understandings to Kampala Amendments, above n 1.

[79] In arguing in Kampala for such an understanding, Harold Koh, Legal Adviser to the US State Department, asserted in a Statement dated 4 June 2010:

> Even if states incorporate an acceptable definition into their domestic law, it is not clear whether or when it is appropriate for one state to bring its neighbour's leaders before its domestic courts for the crime of aggression. Such domestic prosecutions would not be

(V) Conclusion

In my introduction, I raised three basic questions about the crime of aggression: *What is* it? *Who* can commit it? *Where* (other than in an international court or tribunal) may the perpetrators be prosecuted? I suggested that *Sakai*, while it has no definitive answers to any of these questions and hardly stands as authority for anything, is very suggestive of the issues and of potential answers. These issues were all on the table over five decades later at Kampala and are bound to suck up the lives of many trees (and their electronic equivalents) in decades to come.

As to the *what is it?* question, it has always been clear that, for purposes of criminal responsibility, the elements of the crime of aggression entail a combination of something that a State[80] as an entity 'did' and something that an individual did on behalf of that state. Both sets of elements are necessary.

As to the State: at Nuremberg and Tokyo and, I think, in Nanking, there was little discussion of what acts by a State could, in general, amount to aggression. The assumption was that the Axis powers had done 'it' (subject to any possible justifications such as self-defence that tended inexorably to fail on the facts); the question was whether the accused was a person who should bear the responsibility. Kampala, using the General Assembly's definition as a basis, has come up with a list of things that a state might do to bring itself within the aggressor category. Using the Kampala definition of 'act of aggression' as a checklist, I have suggested that Japan's actions fitted most of those 'acts' on the list.

As to the individual and the *who* question: Sakai acted on behalf of Japan, although his plea that he was only acting on orders and that Japan alone should therefore be responsible was not acceptable.[81] Denying the accused a plea of 'act of state' was again a major move made at Nuremberg, Tokyo, and Nanking. Nanking described Sakai as a 'leader' but did not further explain the category. Kampala, echoing Nuremberg, speaks of a 'person in a position effectively to exercise control over or to direct the political or military action of a State'. As in any legal category, there will be easy cases and more difficult cases when it comes to apply this formula, but prosecutors I have spoken to assure me that it can be applied, with

subject to any of the filters under consideration here, and would ask the domestic courts of one country to sit in judgment upon the state acts of other countries in a manner highly unlikely to promote peace and security.

80 It is certainly possible to conceive of aggression being committed by a non-state entity (a terrorist organization, or a dissident group that spreads across borders, for example) but that is not what was prosecuted at Nuremberg and Tokyo and in Nanking. Nor is it what is contemplated in the Kampala Amendments. Other legal categories of crime (terrorism, war crimes, crimes against humanity) are necessary to capture such activities. Professor Larry May, whose path-breaking book suggests a different conceptualization in general from that adopted in Kampala, argues forcefully that 'some terrorist groups can wage war and . . . terrorist leaders can be prosecuted for waging aggressive war as long as such prosecutions are subject to the rule of law': Larry May, *Aggression and Crimes against Peace* (Cambridge: Cambridge University Press, 2008), 297. Given that the ICC will not have jurisdiction in such cases, at least in the foreseeable future, should such developments be encouraged by (another) treaty? By unilateral practice?

81 Above n 30.

little more difficulty than many other criminal categories. I doubt that Sakai would fit the category, but more information about his place in the Japanese hierarchy would perhaps be helpful.

Then there is the question of *where* (in addition to an international tribunal) the crime may be prosecuted. Nanking China had legislation in place (although I do not have the exact text) that permitted the trial of a defeated enemy. No one seems to have had the slightest doubt at the time about the appropriateness of this. As we have seen, there was, however, some debate about the propriety of victim state jurisdiction both in the ILC and surrounding the Kampala amendments. As for universal jurisdiction, there are legislative precedents for taking such jurisdiction, and there are arguments against it. This is no doubt a work in progress and we shall see what happens as states adopt the Kampala amendments as part of their domestic legal structures.

20

'Germans are the Lords and Poles are the Servants': The Trial of Arthur Greiser in Poland, 1946[1]

*Mark A. Drumbl**

In the aftermath of the World War II, the first aggression verdict implicating an influential Nazi official was delivered not by the International Military Tribunal at Nuremberg (IMT) but, rather, by the Supreme National Tribunal of Poland (Tribunal). The accused was Arthur Greiser.[2] Beginning in September 1939, Greiser served as Gauleiter (ie Governor/territorial leader) of the Warthegau, a large expanse of western Poland illegally annexed to Nazi Germany. The Warthegau's residents suffered brutally under Greiser's boot.

Greiser's trial lasted for about two weeks. It started after the commencement of the IMT proceedings, but concluded a few months before the IMT judgment was rendered. The Tribunal sentenced Greiser to death on 9 July 1946. His execution by hanging from a plain wooden gallows took place in the early hours of the morning of 21 July 1946.

The London Agreement and Charter of the IMT and the approaches and strategies of the IMT prosecutors informed the charges brought against Greiser, as well as the legal basis of the judgment. Neither Polish prosecutors nor Tribunal officials saw themselves competing with the IMT. Rather, they saw themselves operationalizing the principles that underpinned the IMT on behalf of the Polish people as victims. Polish national prosecutors felt that the IMT proceedings insufficiently examined the suffering of the Polish people. A pressing need arose to tell this story, for which Greiser's trial served as the opening act.

[1] The text quoted in the title represents Greiser's own words. See 'Trial of Gauleiter Artur Greiser', *The UN War Crimes Comm'n, Law Reports of Trials of War Criminals,* 13 (1949) 70, 98 [hereinafter *Law Reports*].

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[2] His first name also is reported as Artur, for example, in the *Law Reports.*

Greiser, according to Telford Taylor, was the first person to ever be convicted of waging aggressive war.[3] In addition to being forerunners on the crime of aggression, the Greiser prosecution and judgment also liberally incorporated Raphael Lemkin's understanding of and approach to genocide—including the invocation of cultural and spiritual aspects. It did so, however, within the strictures of the charge of 'exceeding the rights accorded to the occupying authority by international law'. Polish national prosecutors strove to edify a narrative of the extermination of the Polish population by the Nazis and the intended replacement of that population through Germanization efforts that Greiser avidly pursued in the Warthegau. The *Greiser* case involved genocide, albeit outside the context of the legal definition in the Genocide Convention, which had not yet been adopted at the time.

Greiser's story is not a completely hidden history. With the exception of a beautifully written biographical work by historian Catherine Epstein[4] and the summary recounting of his trial in the 1949 *Law Reports of Trials of War Criminals* (*Law Reports*),[5] however, Greiser's story remains largely outside common knowledge. Few international observers have had interest in the verdict either then or now. The judgment has never been published in German.[6] Moreover, notwithstanding its pioneering role regarding the crime of aggressive war, the *Greiser* judgment played virtually no role sixty years later in the activities of the Special Working Group, which defined a crime of aggression for the purposes of the Rome Statute of the International Criminal Court (ICC). Despite the unremitting production of legal scholarship on international criminal law and war crimes proceedings, Greiser's trial receives only fleeting and fragmented mention in a handful of law review and law journal articles.

In sum, then, Greiser's story has been told, but its telling is notably understated. In this regard, Greiser's is an undertold story. Yet it is a story whose recovery fulfils valuable pedagogic and didactic purposes.

I aim to accomplish three goals in this chapter, all of which share in common the overarching aim of bringing Greiser and his trial more prominently to the attention of international criminal lawyers, professionals committed to transitional justice, and a general readership concerned with redressing mass atrocity and historical injustice. My first goal is to sketch a portrait of Greiser—his youth, his family, his path to power, and his eventual dénouement—that draws heavily from Epstein's research. My second goal is to summarize Greiser's trial, judgment, and punishment—noting how the proceedings narrated his story and, in turn, a tale of aggressive war. My third goal is more normative in nature, namely, to chart the

[3] Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (Chicago, IL: Quadrangle Books, 1970), 87.

[4] Catherine Epstein, *Model Nazi: Arthur Greiser and the Occupation of Western Poland* (Oxford: Oxford University Press, 2010).

[5] See above n 1. The *Law Reports* summarize the indictment, the trial, and the judgment (in places through direct excerpted quotation of the language of the Tribunal itself). The *Law Reports* also provide analysis of key legal issues and factual background. That said, the *Law Reports* do not verbatim reproduce the judgment.

[6] Epstein, above n 4, 329.

Greiser judgment's effects in international criminal law today and, furthermore, to inquire whether contemporary law and policy can learn anything from it.

(I) Who is Arthur Greiser?

Even though it is easy to reduce atrocity perpetrators to simplistic caricatures of evil, Greiser is a complex individual. Catherine Epstein's seminal book elegantly brings this nuance to life, while also emphasizing the horrid consequences of his orders, the devastation wrought by his activities, and the imperiousness of his intentions. Among a variety of archival sources, Epstein excerpts from the letters Greiser wrote to family and loved ones.

Arthur Karl Greiser was born in 1897 in the German/Polish borderlands (the Prussian province of Posen) into a close family of 'lower middle-class' means.[7] His father was a bailiff. Greiser was the youngest of four children. Throughout his life, Greiser remained especially familiar with his brother Otto—the two shared a similar temperament and politics. His oldest brother, Willy, was never a Nazi. His sister, Käthe, married Alfred Kochmann, a doctor of Jewish origin. With Arthur Greiser's assistance, the couple emigrated to China in 1933 and, ultimately, to New York City, where Käthe lived until her death in 1966. Kochmann was a successful physician. Otto died at the hands of the Russians in the Warthegau during World War II. Willy passed away in 1951.

Greiser fought in World War I. He was devastated by Germany's loss of Posen province. Thereafter, he moved to Danzig.[8] It was during these interwar years that Greiser became an avid German nationalist. According to Epstein, insofar as Greiser's 'experiences had been determined much more by Poles than by Jews, Greiser viewed Poles as the main threat to his nationalist vision'.[9] In short, then, Greiser 'defined Poles, and not Jews, as his major enemy'—a Weltanschauung that stuck with him throughout his life.[10]

Greiser was twice married. His first wife, Ruth (whom he divorced in 1934) survived the war and died in Hamburg in 1984. Greiser met his second wife Maria while he was still married to Ruth. Maria was an accomplished concert pianist devoted to the Nazi party and Nazi classical composer Hans Pfitzer. Heinrich Himmler himself served as a witness at Arthur and Maria's wedding. Greiser had three children—all with Ruth. Two pre-deceased Greiser. His son, Erhardt, perished in a car accident in 1939 while coming home from boarding school to spend Christmas with Greiser; his daughter, Ingrid, died in Germany in the immediate aftermath of World War II; Rotraut, his one surviving daughter—childless—lives in Germany. At the time Epstein conducted her research, Maria—ninety-eight years old—apparently was also still living in Germany.

[7] Epstein, above n 4, 16.
[8] Epstein, above n 4, 4.
[9] Epstein, above n 4, 339.
[10] Epstein, above n 4, 113.

Greiser first became a member of the Nazi Party in December 1929. He was a late joiner. This indelible fact haunted him throughout his career and lingered as a source of insecurity. But Greiser rose in the Nazi ranks—and did so notwithstanding his poor education (he never finished high school). Greiser soon became Deputy Gauleiter for Danzig and, as of May 1934, concurrently served as President of the Danzig Senate.

In Danzig, Greiser was Deputy to Gauleiter Albert Forster, one of Hitler's favourites, who in turn became Greiser's arch-rival. In 1939, Forster effectively sacked Greiser. With war imminent, Forster amalgamated the position of Gauleiter and Head of State of Danzig (a constitutional violation).[11] In order to do so, Forster obtained Greiser's authorization, which was delivered in the form of a pre-arranged letter. This letter endorsed what Greiser had previously spent years trying to fend off. Ironically, this letter came to figure prominently at Greiser's trial. Without acknowledging that, essentially, Greiser was forced to commit to the letter, the Tribunal turned to it to signal how Greiser was a major decision-maker in the planning of the aggressive war in Danzig. Tellingly, after expanding his power, Forster 'insisted that Greiser give up his keys, and forbade his entry into the senate building'.[12]

Greiser was despondent. His fortunes, however, miraculously turned for the better when he was offered the post of Gauleiter of Posen (which was renamed the Warthegau in early 1940), the Polish region that Germany lost after World War I but the Third Reich regained by annexing it following the 1939 invasion of Poland. In 1939, its population encompassed some four million Poles, 325,000 Germans, and 400,000 Jews—all living on a territory of roughly 44,000 square kilometres.[13] The Warthegau was largely rural. It only had two major cities—Posen (Poznán) and Litzmannstadt (Łódź). To its east lay the General Government, from which it was separated by a customs border; a police border separated it from the Old Reich to the west such that passport controls were required.[14]

In his capacity as Gauleiter, Greiser 'decisively shaped policy' in the Warthegau.[15] He fervently introduced a Germanization programme. Germanization initially involved the destruction of Polish society and then, according to Matthew Lippman, the 'imposition of a German socio-political and economic structure'.[16] The influx of Germans was financed by theft, confiscation, and expropriation from those residents who were expelled. Poles deported to Germany for forced labour were made to wear as a distinguishing mark a purple P on a yellow background.[17] All told, Greiser:

> wanted to rid his region of Poles and replace them with *Volksdeutsche* (ethnic Germans). He took away Polish property, placed Polish orphans with 'Aryan' families, terrorised the clergy,

[11] Epstein, above n 4, 121.
[12] Epstein, above n 4, 121.
[13] Epstein, above n 4, 135 (approximately the combined land mass of Massachusetts, Vermont, and New Hampshire).
[14] Epstein, above n 4, 140.
[15] Epstein, above n 4, 340.
[16] Matthew Lippman, 'The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later', *Ariz. J. Int'l & Comp. L.*, 15 (1998), 448.
[17] *Law Reports,* above n 1, 79.

and limited cultural and educational programs. From 1939–1945 he kicked out 630,000 Jews and Poles and replaced them with 537,000 ethnic Germans.[18]

Statistics on resettlement are inconsistent, however, with German news outlets of the time estimating that 818,000 ethnic Germans from different countries had been resettled into western Poland.[19] In any event, tensions—exacerbated by economic pressures—arose within the putative German community regarding the resettlement program. Epstein adroitly documents how the German community in the Warthegau encompassed three subgroups: Reich Germans (those who came from the Old Reich, who comprised the elite), ethnic German resettlers from other regions, and ethnic Germans native to the region.[20] The three categories tended not to speak the same language. Many resettlers, in fact, did not even speak German.

Greiser 'created the harshest anti-Polish regime in Nazi-occupied Europe'.[21] In this regard, he differed from his contemporaries at the Gauleiter level. As part of his Germanization efforts, Greiser even went so far as to alter the Warthegau's natural and physical environment. He changed place names, appropriated art, and removed traditional Polish monuments. He supported reforestation programmes: 'To Germans, nature represented immortality, authenticity, seriousness, resurrection, and German "willpower" . . . [t]rees and forests occupied a particularly special place in the imagined German landscape'.[22]

Once possibilities diminished for other regions to absorb deported Poles and Jews, the mass gassings at Chelmno (which began in late 1941) and other concentration camps emerged as the next turn. Greiser thereby became entwined with the operationalization of the Final Solution. Chelmno was located sixty kilometres from Litzmannstadt (Łódź), whose ghetto was the main collection point for the camp.[23] Chelmno was under the direct command of SS and Police leadership in the Warthegau, who, in turn, cooperated with Greiser.[24] Greiser never had day-to-day control over the activities of the Chelmno execution squad, but he certainly 'shaped the Final Solution in his territory'.[25] The indictment against Greiser alleged

[18] SHOAH Resource Centre, The International School for Holocaust Studies, Yad Vashem, *Greiser, Arthur* (document on file with the author).

[19] *Law Reports,* above n 1, 88. Epstein reports the figure of 536,951. See Epstein, above n 4, 174, 192 ('Greiser raised the percentage of Germans in the Warthegau from 6.6 percent of the population in 1939 to 22.9 percent by April 1944'.)

[20] Epstein, above n 4, 175–6 ('Reich Germans looked down on ethnic Germans; ethnic Germans resented the Reich Germans; Reich Germans were often dismayed by the 'un-German' qualities of resettlers; the resettlers were angered by patronizing Reich Germans; ethnic Germans were jealous of resettlers; and the resettlers felt ill at ease among the ethnic Germans.')

[21] Epstein, above n 4, 230.

[22] Epstein, above n 4, 254.

[23] *Law Reports,* above n 1, 95.

[24] Holocaust Education & Archive Research Team (2007), 'Chelmno Death Camp', *Holocaust Research Project* [website], <http://www.holocaustresearchproject.org/othercamps/chelmno.html> (accessed 26 February 2013) ('The Chelmno death camp was under the direct command of *SS-Gruppenführer* Wilhelm Koppe, the SS and Police Leader in the Warthegau, who was under the direct command of Heinrich Himmler, but Koppe in many cases acted in co-operation with . . . Greiser' and in addition noting that 'Greiser visited Chelmno death camp personally to thank the Commando on their work').

[25] Epstein, above n 4, 182.

that '[i]t must be taken that more than 300,000 persons perished in Chelmno', almost all of them Jews.[26] This statistic has been found to be in error, as noted by Epstein, who affirms that 160,000 Jews were murdered there.[27] The monument at the site of the camp today, moreover, states that 180,000 Jews were murdered there, along with 4,300 gypsies.[28]

According to Epstein, Greiser spent his life trying to become a model Nazi. Why? Epstein suggests Greiser strove to overcome his late conversion to the party, as mentioned earlier, as well as doubts about his war record, his antecedent membership as a Freemason, and his scandalous divorce, adultery, and remarriage.[29] Epstein also deduces that much of Greiser's policies hinged upon positioning. For example, when he thought he could get ahead by being a more moderate Nazi, he did so—such was the case in Danzig when he positioned himself against his foil, Forster.[30] But when he thought he could get ahead by being a zealously radical Nazi, for example while he was Gauleiter, he did so, as well. Epstein posits that, after having been compromised in Danzig when manoeuvring to the moderate side of the party, Greiser subsequently endeavoured to remain on the activist radical fringe.

On 21 January 1945, Greiser's world was rapidly falling apart. Just shy of his forty-eighth birthday, Greiser drove from Poznán to Frankfurt. He did so pursuant to Hitler's order. Nevertheless, as Epstein reports, senior Nazis—whether aware of this important fact or not—scathingly belittled Greiser for this departure which they likened to an abandonment. Goebbels, who was urging the German population to stay and fight, became irate when he had to contend with Gauleiters who abandoned their posts. Goebbels specifically ridiculed Greiser's courage, manliness, and strength.[31] Bormann, who had sent Hitler's telegram telling Greiser to return West, later professed astonishment with Greiser's departure and subsequent arrival in Berlin. Ultimately, Greiser succeeded in persuading Bormann to disseminate a circular that indicated that Greiser left Poznán only because of Hitler's orders. Epstein, however, is skeptical that Bormann's setting the record straight actually 'improved Greiser's negative reputation' or otherwise fulfilled a rehabilitative function.[32]

The Americans arrested Greiser on 16 May 1945, in the Austrian Alps. At the time, Greiser was hiding in a lodge with Maria, together with the equivalent of $35,000 (in 2007; USD) in Reichmarks and briefcases of important documents.[33]

Epstein notes that Greiser faced competing pressures at the end of the war: on the one hand, to maintain stature and honour among the frayed and decaying Nazi leadership and, on the other hand, to minimize perceived liability in the face of imminent defeat and justifiable fears of war crimes trials. After his arrest, in a

[26] *Law Reports,* above n 1, 95. [27] Epstein, above n 4, 317.

[28] Holocaust Education & Archive Research Team, above n 24.

[29] Epstein, above n 4, 339.

[30] See also Epstein, above n 4, 85 ('This "moderate" Greiser has even found literary rendition. In *The Tin Drum*, Günther Grass' masterpiece about the Nazi era in Danzig, Oskar Matzerath, the main character, recalled that 'Greiser never made much of an impression on me. He was too moderate') and 113.

[31] Epstein, above n 4, 306. [32] Epstein, above n 4, 308. [33] Epstein, above n 4, 310.

manner typical for such cases, Greiser downplayed his standing, role, and responsibility for violence. He trotted out the fact that his sister had married a Jew; as well as other tiresome canards, to wit, that the ghettos in Poland were fairly comfortable and that he had no knowledge of the extermination camps.

The German people of the Warthegau were furious with Greiser's delayed evacuation of civilians. Because of this, they lost several days to escape the oncoming Red Army, whose systematic atrocities against the German civilian population also remain an undertold aspect of the World War II. Evacuees endured terrible conditions. Fifty thousand Germans died during their 'flight from the Gau'.[34]

(II) Trial, Judgment, and Execution

On 23 October 1945, the Polish government—evoking the Moscow Declaration of 1943—requested the Americans to deliver Greiser to Poland to face war crimes proceedings.[35] The Moscow Declaration provided that 'war criminals who had committed crimes in occupied countries would be sent back to those countries and stand trial and be sentenced on the basis of those countries' laws'.[36] The Americans agreed. Greiser was transferred in March 1946.

A Polish decree of 22 January 1946, delineated the Tribunal's jurisdiction and powers.[37] The Tribunal was created to prosecute major war criminals. Its purpose was to operationalize the Moscow Declaration. Earlier decrees from 1944 and 1945 elucidated its substantive law of application, in particular a Decree of 31 August 1944, promulgated by the Polish Committee of National Liberation, concerning the punishment of 'fascist-hitlerite criminals' and 'traitors to the Polish nation'.[38] All told, the Tribunal presided over seven cases (the number of individual defendants was greater). Although its seat was in Warsaw, it conducted some of its trials in other cities in Poland. The substantive law applied by the Tribunal took the form of a hodge-podge of special decrees, pre-existing municipal law, and the London Agreement—understandable, to be sure, in light of the paucity of comprehensive law regarding war crimes, crimes against humanity, and crimes against the peace available at the time. Unsurprisingly, the Tribunal's work was challenged by retroactivity claims, which I discuss below because they arose in Greiser's trial.

The work of the Tribunal has nonetheless been lauded. One commentator, for example, renders a favourable assessment of the quality of the Tribunal's work when placed within its historical and temporal context:

> In sharp contrast to the numerous political trials carried out in the country during the same period, in which thousands of individuals accused of 'hampering socialist reconstruction' were

[34] Epstein, above n 4, 303. [35] Epstein, above n 4, 312. [36] Epstein, above n 4, 312.

[37] Subsequent decrees were adopted on 17 October 1946, and 11 April 1947. The 17 October 1946 Decree extended the jurisdiction of the Tribunal to all war criminals rendered to Poland for trial and over alleged war crimes regardless of their place of commission.

[38] The Decree of 31 August 1944, as modified, was eventually consolidated in a Schedule to the Proclamation of the Minister of Justice dated 11 December 1946.

sentenced to death or long prison terms, the [Tribunal's] proceedings applied conventional legal and moral standards comparable to those used in Western courts and investigated each case comprehensively on its own merits.[39]

No doubt, 'Western' courts of the time impinged upon retroactivity principles in the name of the self-evident greater good of prosecuting Nazis—the not-so-self-evident triumph of obvious justice over legalistic minutiae. The favourable assessment of the Tribunal's work when it came to the high-profile Nazis, however, belies a disturbing shadow cast by some of its foundational instruments. The Decree of 31 August 1944, for example, has been characterized as an 'infamous' piece of legislation 'promulgated by the Communist proxy regime and used mainly as a political and legal tool of repression' that facilitated post-war prosecutions, harassment, and torture of persons deemed anti-communist.[40] This Decree, it has been argued, was deployed to target anti-communists on the pretext they were Nazi sympathisers.[41] Consequently, at least insofar as its application to this large class of defendants goes, 'the intention of the authors of the August Decree was to limit, if not outright preclude, the possibility of a fair investigation and a fair trial'.[42]

Greiser's trial, in any event, opened in Poznán on 22 June 1946, to enormous local interest but considerably less international interest. His was the first of the Tribunal's prominent trials. Epstein notes that these trials were intended 'to educate the Polish public about the Nazi occupation'.[43] She observes that '[w]hile the Greiser indictment did not ignore Holocaust crimes, it subsumed the Final Solution under crimes against the Polish people'.[44]

The Tribunal was composed of three judges and four jurors.[45] Greiser stood before it accused of three offences covering a lengthy time period. They involved Greiser's activities in Danzig at the outset of the war, and also his activities while he was Gauleiter of the Warthegau. Although Prosecutors presented these activities as continuous, within the framework of Greiser's life, as discussed earlier, they represented two distinct phases.

The first offence in the indictment against Greiser alleged that, between 1930 and May 1945, he 'took part in the activities of a criminal organisation', to wit,

[39] Alexander V. Prusin, 'Poland's Nuremberg: The Seven Court Cases of the Supreme National Tribunal, 1946–1948,' *Holocaust and Genocide Studies*, 24 (2010), 1 (abstract).

[40] Marek Jan Chodakiewicz, 'The Dialectics of Pain: The Interrogation Methods of the Communist Secret Police in Poland, 1944–1955', *Glaukopis* 2:3 (2004–2005), available at <http://www.projectinposterum.org/docs/chodakiewicz2.htm> (accessed 26 February 2013) (noting also that '[t]he language of the August Decree... reflected the language of contemporary Communist propaganda'). As an aside, Article 4(1) of this Decree criminalized membership in 'a criminal organisation established or recognised by the authorities of the German State or of a State allied with it, or by a political association which acted in the interests of the German State or a State allied with it'.

[41] Chodakiewicz, above n 40 (arguing that the language used in and extrapolated from the Decree 'was a convenient propaganda device commonly employed to dupe the West into believing that the opponents of the Communists were pro-Nazi and that the brutal crushing of the independentist insurrection and the parliamentary opposition in Poland was simply a mop-up operation which fittingly concluded the anti-German struggles of the Second World War').

[42] Chodakiewicz, above n 40.

[43] Epstein, above n 4, 315.

[44] Epstein, above n 4, 317.

[45] Epstein, above n 4, 318.

the Nazi Party, of which he was charged with being 'one of the leaders'.[46] The second offence in the indictment alleged that Greiser was 'in charge of' the Nazi Party branch 'in the territory of the Free City of Danzig' and that in this capacity between 1933 and 1 September 1939 he 'conspired' with German chief government organs to cause warlike activities, aggression, and military occupation of Poland.[47] The indictment offers a detailed account of the unfurling of Nazi aggression against Poland. In actuality, however, it remains doubtful that Greiser was 'in charge of' the Danzig branch. Forster was.

The third stated offence involved the period from 12 September 1939 to mid-January 1945 in the Warthegau. The indictment specifically characterized World War II as having 'begun as a result of German aggression'[48] (unsurprising, insofar as this was—at the time—a legal precondition to charge crimes against humanity). Greiser, in his capacity as Reichstatthalter and Gauleiter of the Warthegau, was accused of 'exceeding the rights accorded to the occupying authority by international law' and of 'contravening the principles of the law of nations and the postulates of humanity and the conscience of nations, both on his own initiative and in carrying out the unlawful instructions of the civil and military authorities of the German Reich'.[49] This part of the indictment charged Greiser with acting 'to the detriment of the Polish State and of its citizens' by his inciting, assisting in the commission of, and personally committing a listed series of offences.[50] Pertinent offences included mass murders of civilians, persecution, deprivation of the private property of the Polish population, and also the '[s]ystematic destruction of Polish culture...and Germanization of the Polish country and population'.[51] The third charge against Greiser was further bolstered by extensive reference to impugned acts, such as the torturing to death of Poles and Jews in concentration and extermination camps, the 'insulting and deriding [of] the Polish nation by proclaiming its cultural and social inferiority', and persecution of the Polish population that 'exceed[ed] in practice the legal and administrative regulations'.[52] Prosecutors, responding to public pressure, emphasized Greiser's role in the destruction of the 'cultural values of the Polish nation' undertaken, *inter alia*, by closing Polish scientific institutions, press, schools, cinemas and, also, destroying monuments, art, and limiting the use of the Polish language.[53] The specifics of the indictment noted Greiser's efforts to liquidate the intelligentsia. Greiser introduced a comprehensive legal regime that systematically persecuted Poles, limited their movements, and festooned public parks with Kein Zutritt für Polen ('No Entry or Access for Poles') signage. Mention was also made in the indictment of Greiser's role in 'depriv[ing] Poles of all confessions of the means of freely practising their religious cult, especially the Catholics who constituted 90% of the population of that area'.[54] Sexual relations between Polish men and German women led to death for the implicated Pole and public humiliation for the woman.

[46] *Law Reports,* above n 1, 70.
[47] *Law Reports,* above n 1, 70.
[48] *Law Reports,* above n 1, 71.
[49] *Law Reports,* above n 1, 71.
[50] *Law Reports,* above n 1, 71.
[51] *Law Reports,* above n 1, 71.
[52] *Law Reports,* above n 1, 71–3.
[53] *Law Reports,* above n 1, 74.
[54] *Law Reports,* above n 1, 73.

Technically, the alleged crimes were proscribed by the 1944 and 1945 decrees and also by the Polish Civil Criminal Code of 1932.[55] So, too, were the punishments. One gap, however, involved the charge of membership in a criminal organization. At the time of Greiser's trial, this crime was not proscribed by the Polish war crimes legislation (a proscription only arose several months after Greiser's trial had concluded).

The indictment itself was extremely detailed. The *Law Reports* set out many of the particulars,[56] which comprehensively narrate the germination of aggression against Poland and the harrowing abuses inflicted upon civilians and prisoners of war in the region. According to the *Law Reports*, however, the Tribunal judgment 'did not deal … in detail with the specific charges' but did 'in its findings of a general character rel[y] to a very large extent on the Indictment'.[57]

Greiser pleaded not guilty. The Tribunal assigned him very competent defence counsel—two prominent Poznán barristers. Upon notification, both lawyers immediately sought to quash this appointment, in particular, because Poznán had suffered so much under Greiser's boot (according to Epstein, one of Greiser's attorneys had himself been deported, and the Germans had murdered two of his brothers).[58] Their requests, however, were denied. Notwithstanding what must have been a searing personal conflict, both counsel engaged in good faith and praiseworthy defence strategies.

At trial, the prosecution called witnesses to testify. Statements that some witnesses had made before Allied authorities in Germany 'were read during the trial'.[59] Nonetheless, 'the case for the Prosecution rested overwhelmingly on legal enactments and administrative orders, and regulations, issued by the accused and other German authorities' and also evidence submitted by requested experts.[60] The *Law Reports* summarize much of this expert evidence.[61]

How did Greiser defend himself? He claimed that: (1) he opposed the war as an instrument to attain the aims of the Nazi party; (2) he submitted resignations, which were never accepted, on four occasions; (3) he acted only upon the express orders of Hitler or Himmler and under the strict supervision of central German authorities; and (4) he had only a restricted responsibility for general matters of policy.[62] Greiser also sought to advance a claim that neither the ordinary police, nor the Gestapo, nor the SS were 'ever subordinated to him in any way or measure [but] always took their orders and instructions directly from Berlin, and particularly from Himmler'.[63] Specifically, Greiser claimed 'for all matters of policy and measures applied and carried out in this territory the responsibility rested entirely

[55] *Law Reports,* above n 1, 107.
[56] *Law Reports,* above n 1, 74–102.
[57] *Law Reports,* above n 1, 74.
[58] Epstein, above n 4, 315.
[59] *Law Reports,* above n 1, 95. Although, in principle, under municipal Polish law witnesses are to appear in person, Article 11(1) of the Decree of 1946 exceptionally permitted '[a]ny records taken during the preliminary investigation and any public or private documents' to be 'read at the trial'. Article 11(2) added that: 'Any records taken during the preliminary investigation within or without the country by the Polish authorities or by any allied authorities, or made by any private persons acting on their own initiative, or any other evidence given with a view to establishing the crime or bringing the criminal to justice, may be read at the trial'.
[60] *Law Reports,* above n 1, 96.
[61] *Law Reports,* above n 1, 96–102.
[62] *Law Reports,* above n 1, 102–3.
[63] *Law Reports,* above n 1, 102.

and exclusively with Hitler and Himmler . . . in his actions he . . . was always strictly supervised by the central German authorities'.[64] The heart of Greiser's defence was that he was a subordinate of Hitler and Himmler; whatever he did they had ordered; and he was routinely subject to their command, censorship, and supervision. In sum, then:

> The accused . . . disclaimed any responsibility for anything that had occurred in concentration and other camps, and for what had been done as regards the extermination of Jews, deportation of Poles, expropriation of property, denationalisation, persecution of churches and other incriminating activities, and alleged that he had no influence whatsoever in these matters. Moreover, in regard to many instances of undoubtedly criminal acts committed by German authorities and officials, which were brought before the Tribunal, the accused denied any knowledge of them.[65]

Greiser had prepared a list of 126 witnesses to testify in his favour, but only 'a few were brought to the stand'.[66] His chief witness was his deputy, Alfred Jäger. The Tribunal did not accept Jäger's evidence as being in good faith. Jäger, in any event, was deeply implicated in wrongdoing as well. He, too, was eventually tried and executed.

The Tribunal delivered its judgment on 7 July 1946. It convicted Greiser of all the crimes with which he was charged—save for one exception, namely, that Greiser did not personally commit any murders or acts of cruelty or inflict bodily harm.[67] Greiser, therefore, was convicted of membership in a criminal organization, aggressive war, and exceeding the rights accorded to the occupying power under international law (in other words, the war crimes and crimes against humanity charge). The *Greiser* case, moreover, has been described as the 'first ever legal ruling on the crime of genocide'.[68] Although the Polish decree that governed the trial did not explicitly refer to genocide, in its judgment regarding the third charge the Tribunal referenced Greiser's actions within the framework of crimes against humanity as a 'general totalitarian genocidal attack on the rights of small and medium nations to exist, and to have an identity and culture of their own'.[69] The Tribunal noted the genocidal character of the repression and the genocidal nature of the attacks on Polish culture and learning.[70] Lemkin's neologism was used to explicate the systematic and legislative nature of the violence against the Polish and Jewish populations. The Tribunal contemplated the physical, biological, spiritual, and cultural aspects of genocide, including Nazi destruction, confiscation, theft, and seizure of cultural property, art, and archives, whether publicly or privately held. Hence, the Tribunal 'broadly conceiv[ed] of genocide as encompassing both the cultural and physical extermination of a religious or national group'.[71]

[64] *Law Reports*, above n 1, 102. [65] *Law Reports*, above n 1, 102–3.
[66] Epstein, above n 4, 320. [67] *Law Reports*, above n 1, 104.
[68] David L. Nersessian, 'The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals,' *Tex. Int'l L. J.*, 37 (2002), 231, 253.
[69] *Law Reports*, above n 1, 114. [70] *Law Reports*, above n 1, 112.
[71] Lippman, above n 16, 448.

The Tribunal judgment relied heavily on documentary evidence. In terms of the substantive law, as discussed earlier, the Tribunal based itself in municipal Polish law. On the charge of membership in a criminal organization, which at the time was not proscribed municipally, the Tribunal grounded itself upon the London Agreement and Charter and, in a subsidiary sense, two provisions of the Polish Criminal Code.[72] On a more general note, as Epstein remarks, the language and principles of the IMT greatly influenced the proceedings against Greiser.[73] A Polish delegation had been granted access to IMT proceedings; one of the prosecutors in the Greiser proceedings had been a member of this delegation. According to Epstein, plans had been made for Robert Jackson to come to Poznán to attend Greiser's trial but these did not come to fruition.

When it came to the aggressive war charge in Danzig, which was proscribed by the governing decrees, the Polish Tribunal also referenced the Versailles Peace Treaty of 1919, the Paris Convention of 1920, and other international treaties including a non-aggression pact signed between Germany and Poland on 26 January 1934. Greiser's defence lawyers had argued that 'international treaties and conventions concerning the renunciation of war as a means for settlement of inter-State disputes … cannot be regarded but as a lex imperfecta, as they did outlaw the war but did not provide for any penalties in this respect'.[74] The *Law Reports* further indicate that Greiser's defence counsel 'also raised the defence of *nullum crimen sine lege poenali*, *nulla poena sine lege* as far as Polish municipal law is concerned'.[75] The Tribunal rejected these pleas, putatively 'in accordance with the state of international and municipal law at the time of the trial', in which the London Agreement and Charter figured prominently.[76] The approach of the Tribunal, assuredly, is not fully convincing from a legality perspective, insofar as the impugned conduct had occurred several years earlier.

The Tribunal found Greiser to be 'one of the chief instruments' in 'the gradually unfolding plan for aggressive war on a world scale … and especially in Danzig'.[77] It characterized Greiser as 'fanatically given over to the idea of a Greater Germany'.[78] Greiser was portrayed as an enthusiastic proponent of Nazi policies. Although the Tribunal linked him to Hitler in a 'conspiratory' sense, it also held that Greiser 'successfully carried out the criminal order of his leader' and found him 'devoted to his leader'.[79] The Tribunal, therefore, seems to implicitly accept that Greiser was not a policy-maker or high-level leader, but still convicted him for crimes against the peace. The Tribunal—either consciously or inadvertently—was tone-deaf to the tensions that raged between Greiser and Forster.[80] In this regard, it seemed to accept the Prosecutor's position that Greiser and Forster were 'in full agreement

[72] *Law Reports*, above n 1, 108. The Polish government first proclaimed adherence to the London Agreement on 25 September 1945. Legislative ratification of this adherence ensued in 1947, as did promulgation in the *Official Gazette*, meaning that the London Agreement then became binding law in Poland. To be sure, this formal officialization post-dated Greiser's trial.

[73] Epstein, above n 4, 315.

[74] *Law Reports*, above n 1, 109–10.

[75] *Law Reports*, above, n 1, 110.

[76] *Law Reports*, above n 1, 110.

[77] *Law Reports*, above n 1, 104.

[78] *Law Reports*, above n 1, 104.

[79] *Law Reports*, above n 1, 105.

[80] Epstein, above n 4, 317 ('The indictment included some factual errors. It did not recognise that Greiser and Forster had been arch rivals in Danzig … It also stated that Greiser aided Forster in his

as to the plan of action' and that the relations between the two men were 'so close'.[81] This historical carelessness is rendered all the more paradoxical insofar as the appointment of Forster as Gauleiter of Danzig proved to be a key element in Greiser's conviction. On this note, the Law Reports state:

> [Greiser] was entrusted with one of the main Party functions (deputy chief of the branch of the NSDAP in Danzig) and put in the principal administrative posts (senator for internal affairs, then vice-president and president of the Senate), in order that he might through such long-term activities bring about an internal revolution in the Free City of Danzig when the time came. This took place on 23rd August, 1939, when, as President of the Danzig Senate, Art[h]ur Greiser, in violation of international law and agreements (Article 104 of the Treaty of Versailles, and the Polish-German non-aggression pact) on Hitler's orders made Gauleiter Albert Forster Chief of 'Danzig State', who in turn illegally incorporated the Free City in the Reich by unilateral act a week later.[82]

According to Epstein, 'the most notable feature of Greiser's verdict—that he was the first man ever convicted of 'crimes against the peace'—was based on the least credible evidence. In Danzig, Greiser was hardly engaged in an organized 'conspiracy' to wage aggressive war'.[83] As an aside, Forster himself was convicted by the Tribunal two years later and was eventually executed in 1952.[84]

With regard to the third charge, namely crimes committed by Greiser in his capacity as Gauleiter, the Tribunal found that 'as a result of [his] direct or indirect orders . . . thousands of Poles and Jews lost their lives, their property was destroyed or removed, Catholic and Protestant churches were ruined, schools and teaching centres shut down'.[85] The judgment summarized the many crimes that had been committed against the Polish population. Unlike the situation with the aggression charge, in this capacity Greiser seemingly acted quite independently and 'did not intend to be merely the trusted servant of his leader'.[86] In this sense, the third charge rested on more solid factual footing. Greiser, in the words of the Tribunal, 'by no means simply blindly carried out the orders of his leader, Hitler, whom allegedly there was no possibility of opposing, but was an independent, ambitious and cunning instigator and organiser of the cruel methods which led to the mass extermination of the local populations'.[87] Greiser, in a nutshell, had considerable agency and discretion once he became Gauleiter of the Warthegau.

The Tribunal was minded that superior orders did not serve as a defence to the charges against Greiser. In this regard, the Tribunal adhered to applicable municipal Polish law, according to which superior orders could only be considered as

being named head of state in Danzig—surely a galling charge, since Greiser had tried to keep Forster from assuming such a position. The section of the indictment dealing with Greiser's actions in Danzig was the least accurate part of the indictment'.)

[81] *Law Reports*, above n 1, 77. [82] *Law Reports*, above n 1, 105.

[83] Epstein, above n 4, 328 (but also noting that, despite the fact that '[b]y western standards [Greiser] hardly had a fair proceeding', overall, 'the court arrived at a fair estimation of Greiser's crimes'.) For Epstein, '[d]espite the flaws of the proceedings, Greiser's trial served both justice and history reasonably well': at 329.

[84] Epstein, above n 4, 338. [85] *Law Reports*, above n 1, 105.

[86] *Law Reports*, above n 1, 113–14. [87] *Law Reports*, above n 1, 114.

a mitigating factor in sentencing.[88] The Tribunal lambasted Greiser for lacking the 'moral courage to admit responsibility for any one of the crimes'; sardonically mocked his claims that he had no knowledge of the crimes that were widespread in the region; and ridiculed him for 'not even accept[ing] responsibility for his own speeches and publications, alleging that they were forced upon him by the central authorities'.[89]

The Tribunal sentenced Greiser to death and, in addition, pronounced the loss of his public and civic rights and the forfeiture of all his property.[90] Matthew Lippman reports that Greiser 'attempted to mitigate his genocidal acts by pointing to the benevolent treatment he extended to his Polish house staff'.[91] The Tribunal responsively noted that a German typically 'can have a "public soul" and a "private soul" '.[92] Greiser's 'benevolence' was found not to transcend the private sphere.[93] Although describing Greiser's attitude as 'good natured and correct,' the Tribunal found that it did not mitigate the gravity of his crimes.[94] Contemporary tribunals have also had to deal with these sorts of claims: to wit, that the defendant saved some members of the victim group, for example, Tutsi in Rwanda. Similarly to the case with Greiser, these claims have for the most part proven ineffectual.

The Tribunal's decisions were final, subject to the caveat that the Polish President had the right of pardon. Greiser feverishly sought to revisit his conviction and sentence. Pope Pius XII interceded on his behalf in this regard, urging the Polish government to grant him clemency (rather ironic, given Greiser's fervent persecution of Catholics in the Warthegau). These attempts, however, were to no avail.

Greiser was executed publicly by hanging on 21 July 1946 in front of the Warthegau Governor's mansion. Crowds of spectators poured in—15,000 in total. It was a quick and absolute reversal of fate for the man who, five years earlier, had boldly brayed: 'Never again will so much as a centimetre of the land we have conquered belong to a Pole. The Poles may work with us, but not as masters, for which they have shown themselves lacking aptitude, but as hirelings.'[95]

(III) Jurisprudential Legacies

The *Greiser* judgment has received very limited play in subsequent international criminal law jurisprudence.[96] A search of the International Criminal Tribunal

88 *Law Reports*, above n 1, 117.

89 *Law Reports*, above n 1, 115.

90 *Law Reports*, above n 1, 104.

91 Matthew Lippman, 'Prosecutions of Nazi War Criminals before Post-World War II Domestic Tribunals', *Miami Int'l & Comp. L. Rev.*, 8 (1999–2000), 1, 111.

92 *Law Reports*, above n 1, 106.

93 Lippman, above n 91, 111.

94 Lippman, above n 91 (citing *Law Reports,* above n 1, 106).

95 *Law Reports*, above n 1, 86 (citing the *Ostdeutscher Beobachter* of 7 May 1941).

96 Nor has *Greiser* substantially figured in the work of influential publicists or experts in international humanitarian law. For example, the International Committee of the Red Cross (ICRC) Rules on Customary International Humanitarian Law refer to *Greiser* only four times in the comprehensive section on practice: in regard to rules relating to public and private property in occupied territory, pillage, forced labour, and the act of displacement. See ICRC, 'Practice', *Customary IHL*, <http://www.icrc.org/customary-ihl/eng/docs/v2> (accessed 26 February 2013).

for Rwanda and Special Court for Sierra Leone websites reveals no references to the judgment. At the International Criminal Tribunal for the former Yugoslavia (ICTY), *Greiser* has been cited five times: in three trial judgments, in a separate and partly dissenting appeals opinion, and in a partly dissenting appeals opinion.

In *Prosecutor v Kupreskić et al*, the *Greiser* case was noted as an interpretive aid in defining the meaning of the term 'persecution' for the purposes of Article 5 of the ICTY Statute.[97] The *Kupreskić* Trial Chamber, Judge Cassese presiding, referenced Greiser's conviction for crimes, including acts of persecution and extermination. The *Kupreskić* Trial Chamber quoted directly from the *Greiser* judgment, which had elucidated Greiser's participation in these acts as involving *inter alia*:

> [M]urdering [Polish and Jewish people] on the spot, concentrating them in ghettos . . . whence they were being gradually deported and murdered, mainly in the gas-chambers of the extermination camp at Chelmno . . . , submitting the Jewish population from the very beginning of the occupation to every possible kind of vexation and torment, from verbal and physical effronteries to the infliction of the most grievous bodily harm, in a way calculated to inflict the maximum of physical suffering and human degradation.[98]

In addition to *Greiser*, the *Kupreskić* Trial Chamber cited several other cases in support of a capacious understanding of the crime of persecution, to wit:

> [T]hat the crime of persecution both during and since the Second World War did not consist only of those acts not covered by the other types of crimes against humanity. On the contrary, these Tribunals and courts specifically included crimes such as murder, extermination and deportation in their findings on persecution.[99]

The ICTY Trial Chamber determined that this understanding was reflective of customary international law.[100] The Trial Chamber, however, then emphasized how persecution is distinguishable from other crimes against humanity insofar as it is committed on discriminatory grounds.

In his partly dissenting appeals opinion in *Prosecutor v Stakić*, Judge Shahabuddeen invoked the *Greiser* judgment's approach to the definition of 'deportation'.[101] Judge Shahabuddeen posited that the *Greiser* indictment arguably used the term 'deportation' in the sense of meaning a 'transfer'.[102] The question that concerned Judge Shahabuddeen was whether a deportation could refer only to the crossing of a border of a state. The *Greiser* indictment had turned to this term in regard to the 'forcible displacement of civilians from one place to another within the same state'—specifically, to the area of the General Government, meaning, according to Judge Shahabuddeen, 'from one area of Poland to another area in the same country'.[103] According to Judge Shahabuddeen, there 'was a demarcation line

97 Case No. IT-95-16-T (14 January 2000), [600].
98 Case No. IT-95-16-T (14 January 2000), [600]; see also [635] footnote 904 (noting that Greiser was charged with the persecution of Polish as well as Jewish people).
99 Case No. IT-95-16-T (14 January 2000), [604].
100 Case No. IT-95-16-T (14 January 2000), [605].
101 Case No. IT-97-24-A (22 March 2006), [29].
102 Case No. IT-97-24-A (22 March 2006), [29].
103 Case No. IT-97-24-A (22 March 2006), [29] footnote 957.

which could not be transgressed'.[104] Greiser, it was noted, was found guilty. In the end, for Judge Shahabuddeen, it did not appear from 'several cases connected with the Second World War', including *Greiser*, 'that there was occasion for the courts to focus on any precise distinction between deportation and transfer or to speak of the former alone in respect of external forcible displacement and of the latter alone in respect of internal forcible displacement'.[105]

The deportation and international borders question also arose in the case of *Prosecutor v Naletilić and Martinović*.[106] In his separate and partly dissenting appeals opinion, Judge Schomburg noted—similarly to Judge Shahabuddeen—that the Polish Tribunal had tried Greiser for *inter alia* 'imprisoning Polish Jewish citizens under his authority in the Łódź ghetto and finally deporting them to the Chełmno extermination camp (both located in Poland)'.[107] Judge Schomburg noted that Greiser was also convicted for 'deporting Polish civilians to the General Government and to forced labour camps in "Germany proper"'. Both acts were considered by the Polish Tribunal to be deportation. In this regard, Judge Schomburg included the *Greiser* case as among 'Nuremberg jurisprudence' that, as a whole, was too inconsistent to serve as authority for a '*de jure* cross-border transfer requirement for the crime of deportation'.[108] Ultimately, Judge Schomburg concluded that 'the crime of ethnic cleansing by uprooting specific parts of a population needs to be called by the name it deserves: Deportation'.[109]

In the Trial Chamber's judgment in *Prosecutor v Krstić*, *Greiser* was cited in a lengthy footnote (containing six other citations) in support of the proposition that, in a number of decisions by the Nuremberg Military Tribunals and the Supreme National Tribunal of Poland, although the crime of extermination was alleged, these judgments 'generally relied on the broader notion of crimes against humanity and did not provide any specific definition of the term "extermination"'.[110] Finally, in the Trial Chamber's judgment in *Prosecutor v Krajišnik*, *Greiser* again was cited (among other cases) in a footnote, this time in support of the proposition that post-World War II jurisprudence addressed, in the context of crimes against humanity, acts such as denial of freedom of movement, denial of employment, denial of the right to judicial process, denial of equal access to public services, and the invasion of privacy through arbitrary searches of homes.[111]

The efforts of the Special Working Group tasked with the definition of the crime of aggression for the purposes of the Rome Statute also reveal the anaemic nature of the *Greiser* judgment's jurisprudential legacy. The *Greiser* case played

[104] Case No. IT-97-24-A (22 March 2006), [29].
[105] Case No. IT-97-24-A (22 March 2006), [29].
[106] Case No. IT 98-34-A (3 May 2006). [107] Case No. IT 98-34-A (3 May 2006), [12].
[108] Case No. IT 98-34-A (3 May 2006), [13].
[109] Case No. IT 98-34-A (3 May 2006), [34].
[110] Case No. IT-98-33-T (2 August 2001), [492] footnote 1132 (specifically noting the *Greiser* case for the proposition 'that the programme implemented by the Nazis corresponded to a systematic programme of genocide which involved *inter alia* the extermination of national and racial groups').
[111] Case No. IT-00-39-T (27 September 2006), [738] footnote 1645.

virtually no role in the Special Working Group's conversations or debates.[112] In fact, the formulation of the crime of aggression advanced by the Special Working Group—and subsequently adopted by consensus by the Review Conference on 11 June 2010, as a proposed amendment to the Rome Statute[113]—would arguably preclude the imposition of individual penal responsibility for the crime of aggression upon officials whose status, authority, and power match that which Greiser himself had exercised.

Proposed Rome Statute Article 8bis (1) defines the crime of aggression as 'the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity, and scale, constitutes a manifest violation of the Charter of the United Nations.' Subsection (2) thereof defines an act of aggression as the 'use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations' while referring to the acts identified under UN General Assembly resolution 3314 (1974) as qualifying as acts of aggression. These acts include invasions, bombardments, blockades, and other evident manifestations of inter-state armed force. Not every act of aggression, to be sure, constitutes a crime of aggression. The acts must be manifest violations of the Charter by virtue of their character, gravity and scale. Moreover, only persons in a position effectively to exercise control over or to direct the political or military action of a state can be found personally responsible for crimes of aggression. This latter requirement immediately emerges from the language of Article 8bis (1), as previously discussed, and also is buttressed by proposed Article 25 (3bis) (which addresses principles and modalities of individual criminal responsibility) as well as the proposed amendments to the Elements of the Crime of Aggression adopted at the Review Conference.[114] These stipulated leadership requirements distinguish the crime of aggression from the other crimes—to wit, genocide, crimes against humanity, and war crimes—proscribed by the Rome Statute.

Although transhistorically there is little doubt that the Nazi invasion of Poland would classify as an *act* of aggression that would give rise to findings of the commission of *crimes* of aggression under the Rome Statute, the question arises as to *who exactly* would bear individual penal responsibility under the proposed Rome Statute framework. Greiser? Probably not. He did not effectively control the political or military action of a state. Nor did he direct such state action. Certainly, he

[112] Drumbl, above n *, 299 (noting that Greiser is 'not discussed in the otherwise comprehensive *Historical Review of Developments Relating to Aggression*, undertaken by the Secretariat for the Preparatory Commission for the International Criminal Court').

[113] Resolution RC/Res.6 (11 June 2010) (also setting forth proposals for the exercise of jurisdiction over the crime of aggression).

[114] Proposed Article 25 (3bis) provides: 'In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.' Element 2 to the proposed amendments to the Elements of Crimes for Aggression requires that the 'perpetrator was a person in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression', while recognizing that 'more than one person may be in a position that meets these criteria'.

did not exercise such influence with regard to Nazi Germany. He did not even exercise it, realistically, within Danzig itself. He was involved in the implementation of aggressive war, but he was not a top policy-maker. He acted upon the orders of others and, ultimately, was sacked by his superior Forster in the immediate run up to war. Assuredly, Greiser exercised great discretionary authority over the Warthegau once aggressive war had begun; in this capacity, however, his criminality involved war crimes, genocide, and crimes against humanity, to which the leadership requirement is not, in any event, formally applicable pursuant to the Rome Statute.

The Rome Statute governs only the ICC. Hence, as articulated by Understanding 4 adopted at the Review Conference, 'the amendments that address the . . . crime of aggression do so for the purpose of this Statute only . . . [they] shall . . . not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute'. National courts can therefore prosecute the Greisers of today—just as a national court had prosecuted Greiser himself. The Rome Statute, however, has tremendous social constructivist effect. It informs the content of national legal systems, whether through direct incorporation or through its status as a normative trendsetter. Its definition of aggression—and attendant leadership requirements—foreseeably may, in turn, come to suffuse national jurisdictional frameworks. The content of the Rome Statute certainly influences the broader corpus of international criminal law in both substance and practice. If the Rome Statute's approach to individual penal responsibility for the crime of aggression seeps into that corpus, and informs national jurisdictional frameworks, then national courts also would be stymied in their ability to prosecute the Greisers of today for the crime of aggression.

(IV) Conclusion

I have elsewhere expressed considerable scepticism about the deterrent and retributive value of international criminal punishment, although I remain more optimistic about the expressive and didactic value of such proceedings.[115] Arthur Greiser's trial reflects the expressive and didactic value of prosecuting and punishing a senior, albeit not top, official for aggressive war. The proceedings offer a detailed account of the build-up to aggressive war in Danzig. They also provide an account of the suffering of the Polish people. Local officials, after all, matter greatly to afflicted local populations.

The restrictiveness of the Rome Statute's approach to who may be prosecuted for aggression reflects, on the one hand, international criminal law's understandable tendency to focus on the most senior policymakers. But, on the other hand, this leadership requirement also may enable many other participants in the aggressive

[115] Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007).

war effort to avoid justice and, accordingly, for the *meso*-narratives of aggressive war to remain untold.

Without the committed support of the upper and senior ranks, and personnel such as Greiser, there would be no war effort at all. Assuredly, as the *Farben* and *Krupp* judgments noted, reaching down and criminally implicating everyone, including the foot soldier, who somehow assists in the war effort would be tantamount to mass punishment.[116] Upper and senior ranks that presently fall outside the scope of the Rome Statute, however, could be included in accountability conversations for aggression without having the law veer in the direction of collective punishment.

Such accountability conversations, moreover, need not take the form of criminal trials. Transitional justice contemplates a broad range of processes. At present, however, criminal courtrooms and jailhouses represent the ideal-type pinnacle of justice, the first-best practice, and the iconic response. Simply put, international criminal law normatively defines the justice agenda. Hence, persons who fall outside of its parameters are, in effect, collectively exonerated. This putative exoneration, in turn, might insulate such persons from other forms of post-conflict justice, such as truth commissions, inquiries, reparations, sanctions, and customary mechanisms. When international criminal law parsimoniously rushes to blame only the very top leadership, it runs the risk of sapping the ability of other accountability processes to deracinate the deeper, structural, systemic, and connived causes of aggressive war.

[116] I.G. Farben Trial, *The UN War Crimes Comm'n, Law Reports of Trials of War Criminals*, 10 (1949), 37–8; Krupp Trial, *The UN War Crimes Comm'n, Law Reports of Trials of War Criminals*, 10 (1949), 127–8 (Judge Anderson's concurring opinion) (also underscoring deterrence as a penological goal of proscribing aggressive war).

21

The Finnish War-Responsibility Trial in 1945–6: The Limits of Ad Hoc Criminal Justice?

*Immi Tallgren**

(I) Global and Local Histories

(1) Tell me a story

The story of the Finnish war-responsibility trial in 1945–6 may be untold elsewhere, but in Finland it is difficult to hide from that part of history.[1] The trial has remained a sore point, at any time susceptible to controversy and vivid emotions. For some of the contemporaries, the trial was part of the preparation for revolution, behind which the whole of international communism was mobilized.[2] For others, criminal responsibility was simply evident and the absence of pre-existing national legislation on the crimes a detail.[3] In the midst of the claims on violation of the legality principle, victors' justice or national political vengeance, the story of the trial became a battlefield of political, ideological and generational conflicts and identification.[4] Commentaries, legal actions and political motions have proliferated

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[1] Most of the historians of recent Finnish history have addressed the trial in one way or another, and the literature is quite overwhelming. Much less research has taken place by legal scholars, and even less so from the point of view of international law. A recent study commissioned by the Ministry of Justice has been most useful for providing both a historical overview and a meticulous analysis of the current context, see Jukka Lindstedt and Stiina Löytömäki: Sotasyyllisyysoikeudenkäynti, Oikeusministeriön selvityksiä ja ohjeita, 22/2010.

[2] Yrjö Soini, *Kuin Pietari hiilivalkealla, Sotasyyllisyysasian vaiheet 1944–1949* (Helsinki: Otava 1956), 373.

[3] Minister Leino in a government meeting on 8 August 1944, see Hannu Rautkallio (ed), *Sotasyyllisyyden asiakirjat*, (EC-Kirjat 2006), 318.

[4] See, eg, Jukka Tarkka, 'Tuomio, syyllisyys ja kunnia', in Jukka-Pekka Pietiäinen (ed), *Sota ja tuomio*, (Helsinki: Edita 2002). For a compilation of personal recollections, see Aarne Långfors (ed), *Isänmaan vangit* (Helsinki: Otava 1997).

throughout the decennia. Recently, an annulment claim in the Supreme Court of Finland, followed by a complaint in the European Court of Human Rights, brought the trial into the limelight again.

In this sense, the story of the Finnish trial situates its narrator directly in the middle of the questions of (collective) memory and its politics: what does the memory of the trial represent and to whom? Why does the story of this trial matter so much? Likewise, the teller is confronted with the discussion on the judicial treatment of (legal) history: can the past be redone, improved the second time? How should today's democracies look back to legally deficient past trials, if at all? Should controversial judgments be annulled or public apologies presented, as is frequently proposed in Finland? What messages would the annulment or excuse send to the society concerned? What would it tell about that society?

This is clearly one important way to look at the Finnish story, and this chapter will address it. Another way to make sense of telling this story today, in 2013, is to search for lessons for the current international criminal justice project,[5] of which today's Finland is one of the most unconditional supporters. This approach situates the story in our current interrogations on the legality and rationality of ad hoc or hybrid trials, as well as on the complementarity of national jurisdictions and the International Criminal Court (ICC). Generally in that project, a criminal trial is seen both as an accomplishment as such, and as having the potential of delivering positive results. This chapter examines this assumption in the context of the Finnish trial that we could—stretching our imagination and tolerance to anachronism—see as a predecessor of a national trial replacing an international one in the spirit of complementarity. But let us start at the beginning.

(2) Of a tiny, young state in world wars from 1939 to 1944[6]

> The winter had been frightful; the terrible cold, hunger, hardships and toil had shrunk the faces of the Finnish people. The hard, bony features of the Kalevala heroes, as painted by Gallen Kallela, were showing again in the pale fleshless faces.[7]

[5] By this is meant here both the existing legal and institutional forms (national and international norms, bureaucracies and adjudication) of international criminal justice, and the political 'movement' that furthers their enlarged role and use in the world. On the 'ICC movement', see Frédéric Mégret, ICC, R2P, and the International Community's Evolving Interventionist Toolkit (2011), (available at <http://ssrn.com/abstract=1933111)>, 5–6. The concept of 'transitional justice' is often used in the context of emerging democracies with regard to their former regimes, as a broader concept including domestic, hybrid, and international prosecutions, truth-telling commissions, reparations, institutional reform, vetting of abusive, corrupt, or incompetent officials, promoting reconciliation, constructing memorials and museums, see International Centre for Transitional Justice, *What is Transitional Justice?* (2006).

[6] The wealth of historical commentaries on the events of 1939–44 is such that this limited chapter based on a conference presentation is not able to take them all into account. When describing the events preceding the trial, it aims simply at presenting an uncontroversial background summary. References are used for additional information only.

[7] Curzio Malaparte, *Kaputt* (New York: New York Review Books 2004), 50. First published in Italian in 1944.

In 1938, the Soviet Union, threatened by Germany, started to pressure Finland with territorial claims to gain space for its defence, in particular to protect the city of Leningrad. After failed negotiations conducted under tense circumstances and repeated threats on Finland's territorial integrity, the Soviet Union attacked Finland in November 1939. Finland was requesting help from its Nordic neighbours and beyond. It received mainly moral or political support, including the exclusion of the Soviet Union from the League of Nations. Promises of military help by the UK and France did not materialize.

Finland's army was small, unprepared and poorly equipped compared to the Red Army, but managed to defend its territory longer than expected. However, by the end of February 1940 Finland was at the point of military collapse. On the Finnish side, some 26,000 military were dead or missing, and 44,000 wounded. On the Soviet side, 127,000 military were dead or missing, and 190,000 wounded.

Finland and the Soviet Union concluded the Moscow Peace Treaty in March 1940.[8] The conditions of peace were considered extremely hard by the Finns, forcing Finland to cede some eleven percent of its territory and some thirty percent of its economic assets, to accept a Soviet military base on its coast, and to evacuate and resettle over 400,000 persons from the lost territories.

Despite the peace treaty, the Finnish government continued to keep the army on war alert, referring to the tense situation in the widening Second World War. It undertook important fortification and rearmament projects. As a result, Finland's military preparedness was remarkably higher soon after the Winter War than before it.[9]

Establishment of good relations with Germany became a priority for the government, while the relations with the Soviet Union were tense, with several minor conflicts arising from the implementation of the peace treaty. In September 1940, an agreement with Germany was concluded, granting troop transfers in Finland to supply the German troops in Northern Norway. At the latest in spring 1941, Finland was negotiating its participation in Germany's war effort on the Finnish front and thus preparing for the war that was generally considered as a continuation of the Winter War, and by many as an opportunity for seeking compensation for the losses of it.[10]

The Continuation War started in June 1941. By September, Finland had reached its previous borders. In Eastern Karelia, it crossed the pre-war borders and occupied areas that had never been part of the Finnish territory, but were populated by peoples linguistically related to Finns.[11] Occupation of these territories meant

[8] See Suomen asetuskokoelman sopimussarja, 3/1940.

[9] It has been suggested that a promise by Hermann Göring of a future recuperation of the lost territories together with the German ally was behind the reasons why Finland accepted the severe Moscow Peace Treaty in 1940. Thus a conscious plan on the Continuation War would have existed very early, see Heikki Ylikangas, *Tulkintani talvisodasta* (Helsinki: WSOY 2001).

[10] Research on the 'drifting' of Finland into the war versus an active stance by Finland in that direction has been vivid though decennia. This chapter follows the currently prevailing understanding based on Mauno Jokipii, *Jatkosodan synty* (Helsinki: Otava, 1986).

[11] In 1923, Finland had brought the issue of Eastern Karelian populations to the League of Nations, and an advisory opinion of The Permanent Court of International Justice was sought although the

interning a significant number of Soviet civilians of mainly Russian or Ukrainian origins in concentration camps. The total death toll amongst camp inmates is estimated at 4,000–7,000. The treatment of civil population considered as representatives of the kindred peoples of Finland was preferential in the occupied territories.

Occupation of the Soviet territories was condemned by several states previously on friendly terms with Finland. The widespread international empathy Finland had benefited from as the tiny victim of the Soviet aggression in the Winter War started to fade away. This development isolated Finland internationally, thus making it even more dependent on Germany for food and military supplies. A further point of international criticism was the treatment of Soviet prisoners-of-war (POWs). Some thirty per cent of the estimated 64,000 Soviet POWs died in Finnish prison camps.[12]

After a two-and-a-half-year standstill in the hostilities, during which Germany's future defeat started to become evident, the Soviet Union intensified its counter-offensive in summer 1944. It drove the Finns back to behind the 1940 borders and forced Finland to accept an armistice. Finland had lost 63,000 military and some 160,000 were wounded. On the Soviet side, some 200,000 military were dead or missing, and almost 400,000 wounded.

The Moscow Armistice between the Soviet Union and the UK with Finland in September 1944[13] meant ceding Finnish territories even further than in the 1940 peace treaty, as well as massive reparations to be paid to the Soviet Union, the dismantlement of Finnish 'fascist-minded' organizations and the handing over to the Soviets various categories of persons. Most importantly, the Armistice obliged Finland to actively disarm and remove German troops from Finland. In the Lapland War between Finland and Germany that followed from this obligation in 1944–5, Northern Finland was devastated. The Paris Peace Treaty in 1947[14] confirmed the conditions of the Moscow Armistice.

(3) Of how stories matter

> Soldiers! The ground you are stepping on is holy ground, impregnated by the blood and suffering of our people. Your victories will free Karelia, your accomplishments will bring Finland a great, happy future.[15]

Court declined to grant it, see 'Status of Eastern Carelia, Advisory Opinion, 1923 PCIJ (ser. B) No. 5' (July 1923), <http://www.worldcourts.com/pcij/eng/decisions/1923.07.23_eastern_carelia.htm> (accessed 20 December 2011).

[12] See Lars Westerlund, 'The Mortality Rate of Prisoners of War in Finnish Custody Between 1939 and 1944', in Westerlund (ed), *POW Deaths and People Handed Over to Germany and the Soviet Union in 1939–55: A Research Report by the Finnish National Archives* (Helsinki: Kansallisarkisto, 2008), 14–84.

[13] See Suomen asetuskokoelman sopimussarja, 4/1944.

[14] See Suomen asetuskokoelman sopimussarja, 20/1947.

[15] An extract of the famous first 'order of the day of the Continuation war' by the Finnish Commander-in Chief Mannerheim, 10 July 1941. He referred to his promise made to the neighbouring Karelian peoples in 1918 'that I will not scabbard my sword before Finland and Eastern Karelia are freed'. Mannerheim's order was his own initiative; it was controversial and caused a wave of immediate political reactions. See, eg, Jukka Tarkka, *Neither Stalin Nor Hitler* (Helsinki: Otava, 1991), 48–50.

One of the most controversial questions in recent Finnish history deals with the character of the Continuation War: was Finland an ally of Nazi Germany or merely fighting a 'separate war' on the side? Proponents of the latter maintain that while participating in the German invasion of the Soviet Union in 1941 (Operation Barbarossa), Finland was solely engaged in its own fight to restore the injustice and the lost territories of the Winter War. In Finland, the 'separate war' has been part of the dominant narrative about the geopolitical and historical context of World War II (WWII).[16] Finland was victim of the 1939 aggression by the Soviet Union, and the following years of WWII are seen in this light. The situation was simply too difficult for a young, tiny, pacific state caught in the middle of two dangerous giants: its communist neighbour, the Soviet Union, and its historical, cultural ally Germany, now ruled by an aggressive dictator. There were no alternatives to the Continuation War: it was a political necessity, a battle for survival. In this light the war begins to look like self-defence since, the argument goes, the Soviet Union (or Germany) would have attacked Finland in any case.

To support this narrative of a separate war, it is often stated that Finland did not sign the Tripartite Pact, unlike the Axis Countries (of course, the Tripartite Pact did not as such contain any obligation to fight a common war). Finland adhered to written and oral agreements on practical cooperation with Germany and de facto acted as its ally, allowing, for example, for the presence of some 200,000 Wehrmacht soldiers in Finland. Based on this, it has been maintained that as a military ally Finland's position can be qualified as an independent co-belligrent of Germany, not decisively different from Hungary, Italy or Romania.[17]

The idea of a 'separate war' also tacitly emphasizes that for Finland's part, the war was 'as clean as warfare could be'.[18] Finland was neither a totalitarian dictatorship like Nazi Germany, nor involved in formulating its imperialistic territorial objectives or its ideology of racial dominance aiming at destruction of others. It is commonly maintained that the Finnish government or administration refrained from the extermination campaign against Jews. While notorious examples of deplorable treatment of foreign Jews, either as refugees or Soviet POWs in Finnish custody, exist[19], Jewish citizens of Finland were in general well integrated in the society and not discriminated against, including in the army.[20] As a result, Finnish

[16] See President Mauno Koivisto's speech in 1993, referred to in Jukka Tarkka, *Hirmuinen asia* (Helsinki: WSOY, 2009), 360–1; the speech by President Tarja Halonen at French Institute of International Relations (IFRI), 1 March 2005: 'For us the world war meant a separate war against the Soviet Union and we did not incur any debt of gratitude to others', see <http://www.tpk.fi>, speeches.

[17] See Jokipii, above n 10, 625–8; Mauno Jokipii, *Hitlerin Saksa ja sen vapaaehtoisliikkeet* (Helsinki: Suomalaisen kirjallisuuden seura, 2002) 46.

[18] Jokipii, *Jatkosodan*, above n 10.

[19] See, for example, Ida Suolahti, 'POW Transfers During the Continuation War 1941–44', in Westerlund (ed), above n 12; Oula Silvennoinen, 'The Transfers of Civilians to German Authorities', in Westerlund (ed). For a journalistic documentary, see Elina Suominen, *Kuolemanlaiva S/S Hohenhörn—juutalaispakolaisten kohtalo Suomessa* (Helsinki: WSOY, 1979).

[20] Public and academic discussion of the treatment of Jews in Finland during WWII remains often polemic, oscillating between picturing Finland as the rescuer (of the Finnish Jews) to be celebrated, or on the other hand as the persecutor (of foreign Jews, the exact number of victims not being unambiguously known) to be undisguised. See, eg, Hannu Rautkallio, *Holokaustilta pelastetut* (Helsinki: WSOY,

Jews fought in the Finnish army together with the Germans in the Continuation War.[21] A few Finnish Jews were granted German decorations for their acts in the front, but declined to accept them.

A few post-war studies and some recent ones have criticized the 'separate war' narrative.[22] Other studies suggest that the walls separating Finland from its Nazi ally in military and executive activities may not have been as water-tight as is often maintained.[23] This chapter is neither intended nor equipped for taking a position in this debate. These controversies are evoked simply because they have a decisive effect on the way the object of our story—the war responsibility trial—is seen in Finland: if the war was separate and 'clean', why did the Allies insist on trials in Finland, just as in the Axis countries? While keeping these sensibilities concerning the Continuation War in mind, we will now turn to the trial itself.

(4) Of the law establishing the Tribunal and criminal responsibility

> We will take the matter out of its own hands, the list of accused will be prolonged, and the punishments hardened.[24]

The Moscow Armistice between the Soviet Union and the UK with Finland in 1944 stated in Article 13: 'Finland shall co-operate with Allied Powers to arrest and pass judgment on those accused of war crimes'. The Finnish leadership understood the obligation to concern prosecution of conventional war crimes only.[25] As

2004); Suominen, above n 19; Elina Sana, *Luovutetut—Suomen ihmisluovutukset Gestapolle* (Helsinki: WSOY, 2003); Hannu Rautkallio, *Ne kahdeksan ja Suomen omatunto* (Helsinki: Weilin & Göös, 1985).

[21] Even a field synagogue was active on the Finnish-German front. The picture was not always as idyllic as that, however; some forms of discrimination and tension existed, see Hannu Rautkallio, *Suomen juutalaisten aseveljeys* (Helsinki: Tammi, 1989).

[22] See, eg, Markku Jokisipilä, *Aseveljiä vai liittolaisia?* (Helsinki: Suomalaisen kirjallisuuden seura, 2004). Generally on the whole discussion, see Timo Soikkanen, 'Objekti vai subjekti? Taistelu jatkosodan synnystä', in Markku Jokisipilä (ed), *Sodan totuudet* (Helsinki: Ajatus, 2007).

[23] For recent research on the cooperation between the security police during the Continuation War, implying the knowledge of and some participation of the Finnish State Police in the torture and execution of POWs, mainly Jews and Communists by the German authorities, see Oula Silvennoinen, *Secret Brothers in Arms* (Helsinki: Otava, 2008). For a journalistic account of the handing over by the Finnish authorities to the German authorities of POWs or other individuals, presumably based on various discriminatory grounds, see Sana, above n 20. See also the research report Lars Westerlund (ed), above n 12; Sari Näre and Jenni Kirves (eds), 'Ruma sota. Talvi- ja jatkosodan vaiettu historia' (Helsinki: Johnny Kniga Publishing, 2008).

[24] Chairman of the Allied Control Commission Zdanov, threatening the Finnish government that was hesitating on the war responsibility issue, quoted by Jukka Nevakivi, *Zdanov Suomessa, Miksi meitä ei neuvostoliittolaistettu?* (Helsinki: Otava, 1994), 159 with reference to the Archives of the Allied Control Commission. Zdanov has also been reported to orally have threatened Finland with a new war, although the threat may have been rhetoric only, see Tarkka, above n 16, 127 and 340–1.

[25] The Tokyo International Military Tribunal (IMT) was established in January 1946 based on Principle 10 of the Potsdam declaration which promised stern justice for *war criminals*. The defence then challenged its jurisdiction for crimes against peace. The challenge was rejected by arguing that the Japanese government had understood that war criminals referred also to those responsible for initiating the war. See judgment of the Tokyo IMT, at 48, 440–1.

the Allies developed their plans concerning the 'major war criminals' of the Axis, they made it clear that they expected the highest leadership of wartime Finland to also face criminal liability for the war of aggression.[26]

The Allied Control Commission, established to supervise the implementation of the Armistice in Finland, exercised considerable influence. Throughout its activity, the leadership and power of the Allied Control Commission were in Soviet hands, and the British members of the Commission were not always informed of events. When they were, even if only retroactively, they generally supported the Soviet position. They explicitly made the Finns understand that any hope of more favourable treatment from the Western powers was futile.[27]

The Allied demands for a trial created public controversy in Finland. Parliamentary questions, authoritative legal opinions and committee reports addressed the issue.[28] Overwhelmingly, the impossibility of such retroactive criminal trials in Finnish law and legal tradition was highlighted. However, there was also internal political support for them, demanding the clarification of political and legal responsibility for the war.[29] The Allied Control Commission's impatience with the Finnish Government culminated in the approval of the London Agreement of 8 August 1945, containing the Charter of the International Military Tribunal (IMT). As a reaction to the escalating external and internal pressure, two weeks later the government presented the draft law on the responsibility for war. The Government threatened to step down if the Parliament failed to adopt it.[30]

The draft law established the criminal responsibility of individuals having, as part of the Government, 'in a significant manner contribut[ed] in Finland's engagement in the war . . . or prevent[ed] peace' in 1941–4. With the explicit temporal limitation included in the law, the trial could address the Continuation War of 1941–4 only. The preceding Soviet attack on Finland and the Winter War of 1939–40 were left outside its scope. The draft law created a special tribunal to conduct the trial, consisting of the presidents of the Supreme Courts, a law professor from the University of Helsinki and twelve Members of Parliament (MPs) appointed by the Parliament. The prosecution was to be carried out by the Chancellor of

[26] The Soviet Union also used Article 13 to require prosecution of conventional war crimes, allegedly committed by Finnish military in the territories Finland was occupying. In 1944, Finnish soldiers were arrested for expected trials. Most of them were freed after pre-trial detention without charges and received compensation from the Finnish state for deprivation of liberty. The most known group is the so-called List No. 1, in which the Soviet Union had included 61 names of alleged war criminals, see Lauri Hyvämäki, *Lista 1:n vangit : vaaran vuosina 1944–48 sotarikoksista vangittujen suomalaisten sotilaiden tarina; toimittanut Hannu Rautkallio*, (Helsinki: Weilin & Göös, 1983). On other trials see discussion further under section II.3.

[27] The Commission consisted of a majority of Soviet officers, plus a few British members. On the role of the Commission and its power constellations, see Tarkka, *Hirmuinen*, above n 16, 121–46; Tuomo Polvinen, *Jaltasta Pariisin rauhaan* (Helsinki: WSOY, 1981), 147–8. Lasse Lehtinen ja Hannu Rautkallio's recent book's main argument is to contest the existence of an important external pressure, and accord the holding of the trial rather to internal political actors, in particular the minister of justice Kekkonen, see *Kansakunnan sijaiskärsijät* (Helsinki: WSOY, 2005).

[28] See Lindstedt and Löytömäki, above n 1, 19–22.

[29] See Nevakivi, *Zdanov Suomessa*, above n 24, 154–69.

[30] Hallituksen esitys nro 54/1945 vp. Laiksi sotaan syyllisten rankaisemisesta, 21.8.1945.

Justice. There was no mention of a right of appeal, but amnesty was possible. The draft law contained no reference to the context of the war, in the sense of Finland having fought as an ally of Nazi Germany. The Chairman of the Allied Control Commission later referred to this tactful omission as a sign of the extraordinary tolerance accorded to Finland in letting it organize its own trial.[31]

The special character of the draft law was made evident in the government bill in two main aspects. Firstly, the law was to be adopted according to the special legislative procedure for the enactment of constitutional legislation (where a regular law is considered to deviate from the constitutional order). In essence this means applying the highest qualified majority voting rule (five to six). According to the bill, the deviations concerned the constitutional prohibitions of retroactive criminal law and of establishing special tribunals. Secondly, the bill, as well as the preamble of the draft law, made direct reference to Article 13 of the Moscow Armistice, thus positing the international legal obligation binding on Finland as the reason behind the proposal.

Serious controversies persisted throughout the parliamentary procedure. Many concerned retroactivity: the draft law created the tribunal, established penal responsibility, and defined the crimes *ex post facto*. The government bill proposing the law acknowledged this retroactivity but referred to the example of the IMT Charter to argue that the responsibility for war could now entail individual criminal responsibility.[32]

Opinion was divided. The Supreme Court, following a request from the Constitutional Law Committee of the Parliament, declared that the draft contained so many fundamental deviations from the Constitution and the general principles of law that it could not be regarded as compatible with the Finnish legal order.[33] The Court observed that Article 13 of the Armistice referred to 'war crimes' that the IMT Charter defined as a separate category (Article 6(a)) from the 'crimes against peace' (Article 6(b)). The wording of Article 13 on 'war crimes' could therefore not also cover the 'responsibility for war' of the Finnish draft law, which was more properly understood as a 'crime against peace' according to the logic of the IMT Charter.

A professor of constitutional and international law of the University of Helsinki, Kaarlo Kaira, argued that the wording 'war crimes' in Article 13 of the Armistice had to be interpreted in a restrictive manner, to include only crimes against the laws and customs of war, although a broader interpretation could not be totally excluded. The London Agreement was not binding on Finland, since it was concluded after the Moscow Armistice. Professor Kaira emphasized that although the London Agreement dealt with those guilty of aggressive war, this type of individual responsibility was novel in international law and should therefore be interpreted narrowly. The Constitutional Law Committee concluded that the London Agreement and the responsibility for crimes against peace concerned

[31] See Polvinen, above n 27, 139–41.

[32] See Hallituksen esitys, above n 30.

[33] Opinion of the Supreme Court to the Constitutional Law Committee, n 1488, dated 28.8.1945, 1945 Vp., reprinted in Rautkallio (ed), above n 3, 674–8.

the leadership of the Axis only; it could not be applied to the political leadership of Finland.[34]

Just before the decisive vote in the parliament, the Allied Control Commission published its view on the validity of the draft law in the major newspapers. It claimed that the Constitutional Law Committee and the Supreme Court had interpreted Article 13 of the Moscow Armistice erroneously and arbitrarily. It further argued that the Moscow Armistice superseded any contradictory Finnish legislation and therefore sufficed in itself as a necessary basis for the trial of leaders.[35] The parliament finally accepted the logic of political necessity behind the government proposal and adopted the law with votes 129 to 12.[36] The President ratified the law on 12 September 1945. The nomination of the members of the tribunal, pre-trial investigations and the preparation of the charges began shortly thereafter.

(5) Of how some characters are given a special role

> Backs were turned to eight men, of whom we knew that they had tried their best for their nation. Their services were compensated by hard labour and prison.[37]

The exceptional character of the trial is demonstrated by the fact that the indictments were made by the Council of State, and the prosecution was led by the Chancellor of Justice. The scope of the accused and the details of the charges followed in large terms the approach of the first investigatory committee in the matter, but in the subsequent investigations the minister of justice in person exercised an important role.[38] The war-time President Risto Ryti, six members of the government and the ambassador in Berlin were prosecuted, but the military leadership was left out of the scope of the prosecutions entirely. The Allied Powers, in particular the Soviet Union, played an important role in determining the scope of the prosecutions. This may have been most obvious in the decision not to indict wartime hero and post-war president, Mannerheim.[39]

The prosecution detailed the charges in seven counts.[40] The first two covered the acts of engagement in the war: having left the country in a state of war alert after the Winter War; having allowed the German forces to trespass and to settle in Finland; having de facto given a declaration of war to the Soviet Union; having

[34] Opinion of the Constitutional Law Committee, n 40/1945, 4 September 1945, reprinted in Rautkallio (ed), above n 3, 666–73.

[35] See Polvinen, above n 27, 137–8; Jukka Tarkka, *13. artikla* (Helsinki: WSOY 1977) 148–9.

[36] For an analysis of the decision-making in the parliament, see, eg, Tarkka, *13. Artikla*, above n 35, 139–49.

[37] Soini, above n 2, 371.

[38] For the conclusions of the Committee, see the memo by its chairman Onni Petäys 24.10.1945, OKV sotasyyllisyyden asiakirjat 1945/1432, Ea 166 (KA). For an analysis of the preparation of the indictment, see Lindstedt and Löytömäki, above n 1, 35–9.

[39] On the pre-trial investigations and the choice of the accused, see Tarkka, *13. artikla*, above n 35, 157–77; Tarkka, Hirmuinen, above n 16, 206–13; Lindstedt and Löytömäki, above n 1, 35–9.

[40] See Rautkallio (ed), above n 3, 631–41.

occupied the territories lost in the Moscow Peace in 1940; and, having penetrated into and occupied territories in Eastern Karelia beyond previous borders. The third count covered government conduct in relation to the state of war with the United Kingdom.

The three first counts comprise conduct that falls under 'crimes against peace' according to the London Charter. The latter four counts concerned the 'preventing peace' part of the tribunal's material jurisdiction (see above). This was interpreted by the prosecution as consisting of decisions or acts having caused Finland to stay in the war from 1941 to 1944 despite several opportunities to seek a separate peace settlement.[41]

This understanding of crimes against peace as consisting also of acts of preventing peace departs from the definition of the Nuremberg Charter and appears to be a Finnish particularity. It can be questioned whether this special approach resulted from the efforts of the Finnish legislators and prosecution to make the crime against peace retroactively fit the events in the predefined period of 1941–4. Since the circle of government members that were publicly singled out by the Allies and the government as guilty of war—those planned to be prosecuted—had actually entered the government only after the decisive steps of engagement to war, the way to target these individuals was to include in the indictment acts committed after the start of war in 1941 as well.

(6) Of a trial with the big bad wolf

> Finland had to be declared the aggressor, and the Soviet Union had to be pictured as a peace-loving, violated victim of an unjustified attack.[42]

The trial was conducted exclusively by the Finns, but the Allied Control Commission exercised considerable influence and interfered at numerous occasions in the work of the tribunal. Its members—the presidents of the two Supreme Courts, a law professor from the University of Helsinki and twelve MPs appointed by the Parliament—worked under heavy pressure, and at least two of the MPs have been, in later analyses, considered biased and sources of leaks of secret deliberations of the tribunal. The trial was public and the accused had defence attorneys but the defence did not have access to all files it requested and was allowed to present the defence to a limited extent only.[43] As a result, no references to the

[41] The counts singled out diplomatic or informal contacts via the United States or other channels after August 1941 proposing peace negotiations with the Soviet Union that had been declined by the Finnish government. In 1943, the Finnish government communicated a further effort to mediate a separate peace with Germany that urged it to decline. In early spring 1944, the government gave an insufficient mandate to the peace negotiators and thereby caused a cessation of the negotiations. In summer 1944, the government recommended giving an assurance to Germany that Finland would not seek separate peace with the Soviet Union, and the President signed it.

[42] The defendant Ryti felt that this was the general expectation of the trial, limiting the way he could defend himself, see Martti Turtola, *Risto Ryti. Elämä isänmaan puolesta* (Helsinki: Keuruu, 1994) 321–2.

[43] See Tarkka, *Hirmuinen*, above 16, 235–63.

preceding Winter War were allowed, although the war and the harsh Moscow Peace Treaty of March 1940 were part of the context in which the subsequent acts leading to the Continuation War took place.

Major incidents of interference with high tensions between the Control Commission, the Finnish government and the tribunal occurred. The decision of the tribunal to set four of the accused free was a red rag to the Soviet chairman of the Allied Control Commission, Zdanov. In response to his virulent protestations, he succeeded in persuading the tribunal to reconsider its decision, and all but one were arrested again.[44] Zdanov also strongly criticized the soft and courteous 'club-like' way the trial proceeded. The accused were allowed to interact with members of the public while entering and leaving the courtroom, receiving expressions of support, and were addressed respectfully with their previous official titles. Some restrictions were introduced at his request.

The most flagrant interference by the Allied Control Commission concerned the judgment itself. The Commission had previously signalled its expectations as to the gravity of the sentences. The draft version of the judgment was leaked to the Commission two days before it was due to be declared. The draft convicted seven of the accused to prison sentences ranging from two to eight years, and acquitted one (the ex-ambassador in Berlin). Early one Sunday morning chairman Zdanov presented himself at the home of the prime minister and angrily protested against the fact that the Commission had not been consulted on the judgment. He criticized the lack of control by the Finnish government over the proceedings and requested that the announcement of the judgment be postponed. He referred to his instructions from the highest military leadership of the Allies. The British also exerted pressure on the Finnish government to have the sentences toughened. The government took these interventions very seriously and passed them on to the tribunal both formally and informally. After painful manoeuvres amongst the members of the tribunal to satisfy the demands of the Commission, the judgment was rewritten.[45] In the revised judgment, all the accused were found guilty. The most severe sentence was given to the war-time President Risto Ryti—ten years' hard labour. The other accused were sentenced to prison sentences from two to six years. The ambassador acquitted in the original judgment was now condemned to five years in prison.

(7) Of 'real persons going to real prisons'[46]

> This is the most noble deed I have been involved in in the last five years... it partly gives redemption to the shameful act... that we felt obliged to commit in 1945.[47]

[44] See Polvinen, above n 27, 139–41; Tarkka, *Hirmuinen*, above 16, 224–35.

[45] See Polvinen, above 27, 145–8; Tarkka, Hirmuinen, above 16, 264–74; Toivo T. Kaila, *Sotaansyyllisemme säätytalossa* (Helsinki: Werner Söderström, 1946), 224–6.

[46] Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millenium* (Ardley-on-Hudson, NY: Transnational Publishers, 2002), 8.

[47] Diary note of date 23 June 1949 by President Paasikivi who accorded the pardons: J.K. Paasikiven, *Päiväkirjat 1944-1956, 2. osa* (Porvoo: WSOY, 1986), 21.

The enforcement of sentences took place in a prison in central Helsinki. The condemned had material conditions of relative comfort, considering the general deprivation and shortages in the post-war period. Generous food packages and other material support arrived at the prison in a regular manner. The condemned were allowed to wear civilian clothing and had opportunities for sport and socializing. They used most of their time for literary and scientific work, and one convict drafted legal expert opinions on command. Dozens of books were published by the convicts. Most of the work undertaken by them was remunerated.[48]

As soon as the Allied Control Commission left Finland in September 1947, paroles and pardons of the sentences began, in accordance with the law in force at the time. The last group of condemned were pardoned by President Paasikivi in May 1949, including the President Ryti, who was hospitalized with a serious illness.

Those former convicts who were in good health were integrated back into society. Expressions of respect and new professional opportunities were presented to them. They received academic honours and leading posts in academia. Two of them were re-elected as members of parliament. One regained his position as the chairman of the social-democrat party. When President Ryti died in 1956, he was given a state funeral. Huge crowds of Finns followed the funeral. Most of the condemned are buried in the national honorary cemetery in Helsinki.[49]

(II) Today's Eyes on the Past

(1) Sixty-five years of controversy

> If it is a crime to love one's home country and people more than one's own right to life, condemning [president] Risto Ryti has been just. If one regards it as a virtue, a judicial murder has been committed against him.[50]

The political and legal polemics surrounding the Finnish war responsibility trial have remained vivid since 1945. The trial has been subject to a wealth of publications, political activity such as parliamentary motions and public statements, and, on several occasions, judicial action (appeal claims to the Chancellor of Justice, extraordinary appeals, as well as a complaint to the European Court of Human Rights (ECtHR)).[51] In this climate, a new episode suffices to revive the public discussion and the controversies: Was the entire trial actually orchestrated by the domestic left and centre, without any real international obligation or pressure

[48] As described in a recent study by Risto Niku, *Kahdeksan tuomittua miestä. Sotasyyllisten vankilavuodet* (Helsinki: Edita, 2005).
[49] Niku, above n 48, 229–40.
[50] Speech by a close collaborator (Mr Puntila) in the funeral of the war-time President Risto Ryti, condemned to ten years hard labour in 1946, see Tarkka, *Hirmuinen*, above n 16, 246.
[51] See Tarkka, *Hirmuinen*, above n 16, 359–61; Lindstedt and Löytömäki, above n 1, 61–2.

behind it, as a recently published study claims?[52] Should the judgment be annulled, or simply accepted as a political necessity of its time?

In this context, successive Finnish governments, the judiciary, academia, media and the public have been wrestling with the same questions of memory, history and justice as known in many other states.[53] Firstly, how to relate to history by legal means? This question typically appears in the form of how far in history does it make sense to hold a criminal trial, when individuals concerned age and the gathering of evidence becomes increasingly problematic.[54] Secondly, how to relate to embarrassing legal history, to procedures that are gravely deficient either in accordance with current law or already with the law of their time?

In the case of the Finnish trial, serious criticisms can and have been levelled. There is no doubt that the law on war responsibility and the trial itself were in clear violation of the Finnish legal order of the time. A retroactive law created a special tribunal and defined the material [applicable?] law. The prosecution's choice of the accused was selective and strongly influenced both by the Allies and by national politics (see section I.5). As has been discussed above (see section I.6), insufficient rights were granted to the defence. Some members of the tribunal were most likely biased, and both the Allied Control Commission and the Finnish government interfered seriously throughout the trial and with the judgment. The list goes on, but we will leave it here for now.[55]

Compared internationally to other trials directly after the war[56] or, as today's example of an exceptional situation with exceptional legal needs, to the 'war on terror' from 2001 onwards—the anachronism and absurdity of the comparison notwithstanding—the Finnish story appears in a very different light: There was a public trial, based on a parliamentary law. There was no arbitrary detention, no allegations of torture or other mistreatment, no transfer to a foreign state, neither for investigations, trial nor for enforcement of sentences. Nobody died in custody or in prison. Considering the widespread damages of the war, the punishments were lenient, both compared to those for serious crime in the regular national context and to other comparable trials of the time. The prison conditions were comfortable considering the standards of the difficult time. Paroles and pardons were granted. Although the convictions must have been a tremendous burden to the individuals and their families, there was no general rejection of the condemned by the society and their reintegration proceeded smoothly.

[52] See Lehtinen and Rautkallio, above n 27.

[53] The obvious examples of these contexts are Germany with the Vergangenheitsbewältigung after Nazism, France's collaboration with Russian and Eastern European communist totalitarianism, and colonizing states with colonialism, although most countries and regions are likely to have their national traumas. On France, but with interesting general methodological positions, see Henry Rousso, *The Haunting Past* (Philadelphia: University of Pennsylvania Press, 2002). See also Stiina Löytömäki, 'Law and the Global Phenomenon of Righting Old Wrongs', (2004) *Finnish Yearbook of International Law*, Vol. *XV*, 273.

[54] For a recent case, see ECtHR, *Kononov v Latvia*, 17 May 2010.

[55] See Lindstedt and Löytömäki, above n 1, 29–48.

[56] A comparison is beyond the scope of this Chapter. For limited comparisons, see Tarkka, *13. artikla*, above n 35, 63–6 and 150–7; Tarkka, *Hirmuinen*, above n 16, 304–14; Polvinen, above n 27f WW n, 148–9.

Based on the story so far, we could tentatively conclude here that the Finnish trial represented exceptional justice following WWII. Compared to the aftermath of WWII internationally, Finland may appear as a special case: why were there so few accused, and why were the punishments so lenient compared to other countries in a similar position? How was it that everything was so calm and controlled, with no self-inflicted justice or scandals? In this respect, it would be a mistake to point to a general consensual and lenient climate in Finnish legal culture and criminal policy, in particular in conditions of political instability or war. Only some twenty-five years before the war responsibility trial there was a wave of legal and extra-legal retribution during and after the 1918 Finnish civil war, with violence on both sides (though predominantly on the side of the Whites, the conservative coalition).[57]

Seen through modern eyes, this becomes intriguing. Why was the war responsibility trial so shocking? Where does the lasting sense of tragedy and injustice come from? It seems we need to dig deeper to fully understand the trauma of the trial.

(2) Legal treatment of past legal treatment

The most recent legal action concerning the trial that had considerable public attention was an annulment claim to the Supreme Court of Finland in 2008. Mr Ilkka Tanner, grandson of the social-democrat wartime minister Väinö Tanner, requested annulment of the 1946 judgment by which Tanner had been declared guilty of 'misuse of official authority to the detriment of the nation', and the annulment of his five-and-a-half-year prison sentence.

In its decision, the Supreme Court analysed the law of 1945 and the trial in considerable detail. It unequivocally stated that the trial violated many of the essential principles of the Finnish legal order. It went on to declare that its establishment and activity took place on grounds and in circumstances that must be regarded exceptional. The Court pointed out that the law of 1945 did not contain provisions on ordinary or extraordinary means of appeal. Highlighting the special circumstances, the Court concluded that a retroactive examination of the judgment and the procedure leading to it on the basis of the general Finnish law on annulment of judgments or extraordinary appeals for procedural fault was not within its competence.[58]

Mr Tanner then brought the case before the ECtHR. He based his claim on Article 13 of the European Convention of Human Rights (ECHR), which sets out the 'right to an effective remedy', and on Article 2 of Protocol No. 7 on the 'right of appeal in criminal matters'. In his complaint, the applicant claimed that since

[57] See Jaakko Paavolainen, *Poliittiset väkivaltaisuudet Suomessa 1918. Osa 1: Punainen terrori* (Helsinki: Tammi, 1966); *Osa 2: Valkoinen terrori* (Helsinki: Tammi 1967); Jukka Kekkonen, *Laillisuuden haaksirikko. Rikosoikeudenkäyttö Suomessa vuonna 1918* (Helsinki: Lakimiesliiton Kustannus, 1991); Lauri Hannikainen, 'The Finnish Civil War in 1918 and its Aftermath' in Lauri Hannikainen, Raija Hanski and Allan Rosas (eds), *Implementing Humanitarian Law Applicable in Armed Conflicts, The Case of Finland*, (Leiden: Martinus Nijhoff Publishers, 1992), 8.

[58] Supreme Court of Finland, decision 2008:94.

annulment of the war responsibility judgment was not explicitly excluded in the law of 1945, the Supreme Court could have considered itself competent. The lack of any means of appeal violated his rights.

In the wake of these domestic and European legal procedures, active public discussion followed, prompting the Ministry of Justice to react. Different means to redress the situation were considered, including legislative means, either to open a possibility for extraordinary appeal or to directly annul the judgment.[59] The Ministry commanded a report on the legal aspects of the past trial and the potential options for an official reaction to it outside the sphere of legal remedies, such as a public apology or a statement.

In the meantime, the ECtHR, by a committee of three judges, including the Finnish judge, declared the application inadmissible on 23 February 2010. The basis of incompatibility evoked in the decision was that of *ratione personae*, ie, the appellant could not be considered victim of a violation in the sense of Article 34 of the ECHR.

The report commissioned by the Ministry of Justice was published on 12 March 2010. It states without ambiguity that Finland's military activity in the Soviet Union fulfilled the material elements of crimes against peace.[60] The report questions whether international law was already at the time of the trial considered to supersede potentially contradictory national law, and whether the London Agreement (together with the IMT Charter) formed a sufficient basis for the individual criminal responsibility imposed on the eight accused in the Finnish trial in accordance with Article 13 of the Moscow Armistice. With strong reservations, it concludes in the positive,[61] while at the same time highlighting in detail the serious breaches of the Finnish constitution and the other highly problematic aspects of the trial.[62]

In conclusion, the report emphasizes how the war responsibility trial is not the only controversial or questionable legal episode in Finnish history, and invites examination of the (legal) past using a global approach. The report cautions against using legislative means to redress the outcome of the war responsibility trial, but otherwise refrains from recommendations on whether a political reaction, such as a public apology or a statement aimed at nullifying the judgment would be advisable.[63] As the report points out, the practice of expressing public apologies by the government is almost unheard of in Finland.[64] The public apology by Prime Minister Paavo Lipponen in 2000 concerned the handing over by the Finnish State Police to the German authorities of eight Jewish refugees, including two children, all but one of whom died in Auschwitz.[65] This is so far the only precedent against which to measure the gravity of wrongs necessitating a public apology.

[59] 'Väärät tuomiot sotasyyllisyydestä ministeriön syyniin', *Helsingin Sanomat* 5.2.2009. See also Lindstedt and Löytömäki, above n 1, 84–5.

[60] Lindstedt and Löytömäki, above n 1, 51.

[61] Lindstedt and Löytömäki, above n 1, 52–4. For a critical view on this, see Mikaela Heikkilä, 'Suomen sotasyyllisyysoikeudenkäynti ja kansainvälinen rikosoikeus', (2010) *Lakimies 4*, 638.

[62] See Lindstedt and Löytömäki, above n 1, 29–48.

[63] Lindstedt and Löytömäki, above n 1, 81–8.

[64] Lindstedt and Löytömäki, above n 1, 85.

[65] See Sana, above n 20, 15–16.

In 2008, the Finnish judiciary chose to remain silent. Now that the ECtHR has declared the case inadmissible, the executive is likely to remain silent as well, at least until the next major eruption. Let us profit from the calm to try to make some sense of the story.

(3) Why criminal justice?

In the aftermath of WWII, the sense of the trials did not attract much explicit analysis. Considering the large-scale violence and destruction experienced, elaborate debates on justifications for punishing the perpetrators may have seemed irrelevant or even absurd.[66] As Robert Sloane writes, '[a]t the time, the very notion that the most culpable Axis leaders and war criminals, men like Göring, should be subjected to the unwieldy and costly processes of the law proved controversial'.[67]

Some recent studies have started to sketch the outlines of a criminological approach to international criminal justice, by analysing the justifications for and legitimate goals of punishment.[68] Here it is enough to say that punishment is conventionally justified either by its presumed positive functions in controlling future crime (by general and specific deterrence, incapacitation or rehabilitation of the offender) or by retribution.[69] Additional expectations of positive effects justifying international criminal justice frequently evoked include the expression[70] (or communication, implying interaction and inclusion[71]) of values of the international community, reaction to the expectations of the victims, contribution to establishing or maintaining peace or the rule of law (locally or internationally), establishment of historical understanding and a record of the dolorous past, or performance of a ceremony or service advancing reconciliation and the feeling of closure in a community.[72]

[66] See Robert D. Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law', (2007) 43 *Stanford Journal of International Law 39* (2007), 65; Telford Taylor, *The Anatomy of the Nuremberg Trials* (Boston: Knopf, 1992).

[67] Sloane, above n 66, 65.

[68] See Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007); Sloane, above n 66 ; Marc Osiel, 'Why Prosecute? Critics of Punishment for Mass Atrocity', (2000) *22 Human Rights Quarterly*, 118; Immi Tallgren, 'The Sensibility and Sense of International Criminal Law', (2002) *13 European Journal of International Law*, 561. See also Anthony Duff, 'Can We Punish the Perpetrators of Atrocities', *The Religious in Responses to Mass Atrocity*, Brudholm, Cushman (eds) (Cambridge: Cambridge University Press, 2009), 79, Laurel E. Fletcher, 'From Indifference to Engagement: Bystanders and International Criminal Justice', (2005) *26 Michigan Journal of International Law*, 1013; Laurel E. Fletcher & Harvey M. Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation', (2002) *24 Human Rights Quarterly*, 573.

[69] See, for example, Anthony Duff and David Garland (eds), *A Reader in Punishment* (Oxford: Oxford University Press, 1994); David Garland, *Punishment and Modern Society* (Oxford: Oxford University Press,1990).

[70] See J. Feinberg, 'The Expressive Function of Punishment' in *Doing and Deserving*, Feinberg (ed) (Princeton: Princeton University Press, 1970), 95; compare to A.J. Skillen, 'How to Say Things with Walls', *55 Philosophy* (1980), 509.

[71] See Anthony Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001).

[72] On these additional aspects, see the references above n 68.

Assuming a set of rational objectives exists, one should, in theory, be able to evaluate the usefulness of criminal justice by seeking to understand how far it enhances these objectives. Criminological research is challenging, even in established, stable domestic legal systems. Concerning international criminal justice, the difficulties grow exponentially: what area, which actors, what timeframe? How to obtain empirical evidence? Focusing on isolated trials such as the Finnish one hardly makes any sense at all. We do not have opinion surveys, statistics or other material. On prevention of future crime, we could hardly say more than that wars of aggression have been waged in the world since, although none with the involvement of Finnish government members. When it comes to the other potential positive effects referred to above, however, we might for the sake of our story sketch some observations. What sense may the trial have had, what purpose may it have served, and what kind of effects—if any—may it have on the society?

The trial derived from the same origins as the London Agreement and expressed the condemnation of the emerging international community of 1945 (itself in transition) of the violation of the principles of territorial sovereignty and the prohibition of wars of aggression that was more explicitly expressed the same year in the Charter of the United Nations (UN). However, in 1945–6, crucial years for the further development of international criminal justice, the trial was often seen in Finland as a separate issue from the trials in the Axis states and their satellites, as discussed above. For Finns, it was all between Finland and the Soviet Union. Any expression of values must have suffered from this: it was not clear to Finns who was behind the trial. The international community had a Soviet face and a Soviet voice. Further, the fact that the law on war responsibility, enacted under constraint, still underwent careful scrutiny involving not only the parliament but also the judiciary and academia (discussed above) could be seen as a strong sign that Finland had remained an independent democracy with a legalistic political culture. The military defeat was unambiguous, and the Soviet threat was felt strongly, in particular in the light of what was simultaneously occurring in the neighbouring Baltic States. Nevertheless, an important part of the society rejected a trial that they saw as unfair. In that sense, the resistance to the trial became a heroic continuation of the war. From the criminological point of view, however, the conditions for communicating values in a criminal trial were clearly not optimal; the messages got blurred.

With regard to establishing a historical understanding of a difficult past, or advancing reconciliation and the feeling of closure in a community, we are again facing large-scale and complex sociological phenomena. The trial and its effects form a piece in the puzzle of the evolution of today's Finland, and we are unable to see clearly how. We have observed the repeated demands for annulment of the judgment, for public apologies to the condemned or their families and for other gestures countering the judgment. As the latest developments show, these demands enjoy widespread support and perhaps a tacit approval from the government, but they also have opponents. Has the trial contributed to reconciliation, social peace and establishing a historical record, or might it have played its part in hindering open, honest analysis of past traumatic events? Rather than serving as a forum for bringing light to the shared

experiences of the people and its leadership, could the 'shameful trial' have turned the accused leaders into martyrs?

We might then reflect upon whether, rather than bringing the transitional society towards understanding and acceptance of the past, the trial might have contributed to creating a taboo: that Finland, after its war of self-defence against the Soviet Union in most unequal conditions, turned into an ally of Nazi Germany and attacked the Soviet territory beyond its previous borders, with major damage to human life, society and economy on both sides. Further, that although the Finnish army did not directly participate in the siege of Leningrad, by holding positions close to the city it contributed to its immense losses of life.[73] The taboo might have rendered some questions inappropriate or 'political', such as: was the conduct specified in the charges merely—as presented by the defence and in many commentaries—patriotic acts by rational, law-abiding leaders, solely driven by the salvation of an independent Finland? Had the Finnish leaders not, by engaging in the war, firmly counted on the future victory of Nazi Germany in WWII? If that was not the case, does their choice of alliance not appear self-destructive? What was the ideological drive behind this choice? Had the leaders not thereby accepted the consequences of Hitler's victory worldwide, in Europe, and in Finland, including the racial policies and the persecution of political opponents? What kind of an independent Finland did they envisage?

We may also inquire about the judicial treatment of the war crimes outside the jurisdiction of the special tribunal, such as the treatment of the Soviet POWs or civilians in occupied territories and the summary executions, or handing over Jews, presumed communists and other individuals to the Germans.[74] Although a number of trials took place after the war, primarily concerning the treatment of the Soviet POWs, the legal responsibility at the decision-making level for the various crimes was not addressed at that time, and has not been addressed since.[75] It seems as if the war responsibility trial exhausted any will and confidence in legal treatment of the difficult past.

These questions are by no means secret. However, public discussion and research on them seems to remain prone to stigmatization and dramatization. Claims of 'dirtying the nest', 'insulting the veterans' or 'bowing in the direction of Moscow' are not infrequent. We have no intention to engage further in counterfactual history-writing here, but it is difficult to resist the following query: Would the understanding of history, as well as of the political or legal responsibilities for

[73] The eventuality of this, as well as a potential responsibility of Finns for it was known to Finnish leadership, see, for example, Tarkka, Hirmuinen, above n 16, 36–7.

[74] A recent research project in the National Archives has provided several publications, summaries of which are compiled in English, see Westerlund (ed) above n 12. See also Lindstedt and Löytömäki, above n 1, 68–79.

[75] Hundreds of trials targeted low-ranking officials on the treatment of the Soviet POWs and the interned persons. See Raija Hanski, 'The Second World War', in Hannikainen, Hanski, Rosas (eds), above n 57, 41, 72–3; Antti Kujala, *Vankisurmat. Neuvostosotavankien laittomat ampumiset jatkosodassa* (Helsinki: WSOY, 2008), 11; Hyvämäki, above n 26. On the political side, an exception to impunity was the trial of Arno Anthoni, Director of the Finnish State Police, on the handing over of Jewish refugees to German authorities. See, eg, Rautkallio, *Ne kahdeksan*, above n 20; Anthoni was condemned to a warning, and he was compensated for the time of pre-trial detention.

eventual mistakes or crimes committed, not have come to light in a democratic society more easily had the trauma of the trial not frozen opinions and rendered open questioning unpatriotic? In that sense, the rejection of the trial may have been a way to deny or obscure the damages of the war that encompassed the society, political culture and economy, as well as Finland's identity as a democratic and peace-loving state. By victimizing and traumatizing the trial may thus have, for its part, slowed down the mourning, healing, and closure after the wars.

We may today feel inclined to include this failed experience among many other controversial post-WWII examples that belong to the stone age of international criminal justice—as part of the unfortunate but necessary local problems that are a turning point in global history. This is why we will proceed to briefly examining how far criminal justice in comparable situations today has evolved in a direction that guarantees more favourable preconditions.

(4) Limits of ad hoc criminal justice

The ICC was created to remedy the existential deficiency of international criminal justice, either totally absent or relying on ad hoc foundations, such as peace treaties or UN Security Council resolutions. The adoption of the ICC Statute[76] in 1998 carried the promise of a major change: a permanent, independent and impartial judicial organ was empowered to decide on individual criminal responsibility, even at the level of heads of state.

As our Finnish story and so many other stories demonstrate, the basic ideology of international criminal justice has by definition a tense relationship to the dominant political entities controlling the use of force in their territory and to their citizens or interests, ie, states. The prerogative of states includes criminal law, understood to embody the most coercive norms in a society. In that sense, international criminal justice is not meant for peaceful, healthy democracies where individuals enjoy rights effectively protected by the national legal system. Its landscape is rather that of conflict, crisis, war, regime changes, or totalitarian governments with legal systems harnessed to further their objectives.

International criminal justice thus typically actualizes in a broader context of condemning the past and reorienting for the future, whereas national criminal justice operates in existing domestic constellations: the law in force, the judiciary in function, the executive in power. By its name and definition, and following from this basic setting, international criminal justice contains non-national influences, actors, and involvement. Seen from the perspective of a state, international criminal justice can stand for various degrees of foreign intrusion in national legal systems and power structures. The transforming potential of international criminal justice in this optic is part of the more general leverage potential of international law, human rights law or the ideology of internationalism in general. International criminal justice belongs to the package of international instruments and effects to incite,

[76] The Rome Statute of the International Criminal Court, 37 ILM 1002 (1998).

bring about or even violently force societies towards political change, revolution and reorientation. This partly explains why international criminal justice is constantly faced with conflicts and criticism, be it on its legitimacy, independence or methods of proceeding.

In today's international criminal jurisdictions, and at the ICC in particular, this 'revolutionary element', a sort of inbuilt incitement to reconsider the existing power structures of a state, is clearly present. Instead of mission statements, it appears in jurisdictional mechanisms or legal principles. This was evident in the establishment of the ICC, in the sense that the states negotiating the Rome Statute did not seem to consider its creation as anything that should ever concern them directly. On the contrary, utmost care was taken by all states in the position to play a role to make sure it never would.[77] The Statute thus underlines that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.[78] The ICC's proper jurisdiction is meant as a mere safeguard system that—in the optic of the negotiating states—was meant for others: for aggressive or disruptive states, for failed states, or for weak states that lack a functioning legal system.

The delicate relationship of national and international criminal jurisdictions in the context of the ICC is referred to as the complementarity of international criminal jurisdiction. The complementarity is anchored in Articles 17 and 20 of the ICC Statute, and can be condensed as follows: the ICC may proceed with a case only if the state or states with jurisdiction are unwilling or unable to genuinely carry out the investigation or prosecution.[79] In order to determine whether this is the case, independence and impartiality of national proceedings are evaluated, as well as whether the national proceedings or decisions were made with the purpose of shielding the person concerned from criminal responsibility. In the Finnish story, we can see elements of a comparable evaluation exercised by the Allied Control Commission and the Finnish executive, albeit awkwardly and illegally.

Compared to the time of the post-WWII trials such as the Finnish one, the role of the principle of legality (*nullum crimen sine lege*, *nulla poena sine lege*),

[77] On the ICC negotiations, see Philippe Kirsch and John T. Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process', (1999) *93 American Journal of International Law*, 2; Roy S. Lee, 'The Rome Conference and its Contribution to International Law' in Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (Alphen aan den Rijn: Kluwer Law International, 1999), 1; John Washburn, 'The Negotiations of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century', (1999) *11 Pace International Law Review*, 361. See also Antoine Buchet and Immi Tallgren, 'Sur la route de Rome—Les negotiations préalables à l´adoption du Statut de la Cour pénale international' in Emmanuel Decaux and Serge Sur (eds), *Commentaire du Statut de Rome de la Cour Pénale Internationale* (Paris: Pedone, 2012), 171.

[78] Rome Statute, above n 76, 17 July 1998, preamble.

[79] See John T. Holmes, 'The Principle of Complementarity' in Roy S. Lee (ed), above n 77; William W. Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System on International Justice', (2008) *49 Harvard International Law Journal*, 53. See also Immi Tallgren, 'Completing the "International Criminal Order"—The Rhetoric of Repression and the Notion of Complementarity in the Draft Statute for an International Criminal Court', (1998) *67 Nordic Journal of International Law*, 107. For the resolution of the Kampala Diplomatic Conference on complementarity, see Resolution RC/Res. 1 (8 June 2010).

too, has evolved dramatically, in two directions. It has been further clarified and strengthened in the sense that it has been encoded in human rights conventions and innumerable national constitutions.[80] The existence of individual criminal responsibility solely based on customary or treaty-based international law for the most serious international crimes has been firmly established. We can thus see more clearly today than in the 1940s the coexistence of a legality principle of general international law, 'broader and considerably more tolerant of imprecision'[81] and of the particular forms of the same principle either in national legal systems or in specific treaty-based contexts, such as the ICC.

The ICC Statute contains articles on the *nullum crimen sine lege* (Article 22), *nulla poena sine lege* (Article 23) and on non-retroactivity *ratione personae* (Article 24). The ICC is clearly meant as a permanent jurisdiction, not as a special tribunal created for a limited period of time, a particular chain of events, or even a particular group of individuals, as was, for example, the Finnish tribunal. However, from the perspective of the states or individuals concerned, this may in some cases be less clear. The most evident case encompasses non-State Parties and their nationals. Out of the 193 UN member states at the time of writing, 119 states are members of the ICC. The non-members include China, India, the United States, Russia, Indonesia, Pakistan, Thailand, Vietnam, and Sudan, to name a few. In terms of population, a majority of the world's population today are citizens of states not parties to the ICC.

In accordance with the ICC Statute, the ICC Prosecutor can initiate an investigation on the basis of a referral from any State Party or from the UN Security Council. In addition, the Prosecutor can initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the ICC received from individuals or organizations. For alleged crimes taking place in non-State Parties or by their nationals, the most likely way to end up in the ICC is by a referral of the Security Council.[82] The referral takes place either after or in the midst of the situation in which crimes have been allegedly committed (examples of Darfur and Libya). Considering that the permanent members of the Security Council have a right to veto

[80] See Article 15 of the UN Covenant on Civil and Political Rights (1966) UNTC, vol. 999, 171; Article 7 of the European Convention of Human Rights (1950).

[81] Bruce Broomhall, 'Article 22', Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Berlin: 2nd edn, Nomos, 2008) 713, 716. M Cherif Bassiouni wrote, before the ICC era: 'the "principles of legality" in international criminal law…are necessarily *sui generis* because they must balance between the preservation of justice and fairness for the accused and the preservation of world order, taking into account the nature of international law, the absence of international legislative policies and standards, the *ad hoc* processes of technical drafting and the basic assumption that international criminal law norms will be embodied into the national criminal law of various states.': *Crimes Against Humanity in International Criminal Law* (Leiden: Martinus Nijhoff Publishers, 1992), 112.

[82] In accordance with Article 13(b). In addition, a non-State Party can 'accept the exercise of jurisdiction by the Court with respect to the crime in question' (Article 12, para. 3). Finally, the Court may exercise its jurisdiction for crimes committed in the territory of States Parties, including on nationals of a non-State Party. This was behind the special agreements the USA has concluded with several ICC Member States. See ICC Statute Article 12 and its commentary by Sharon A. Williams and William A. Schabas, 'Article 12', Otto Triffterer , above n 81, 547, 556–7.

these decisions, some states are able at their will to permanently keep their citizens and leaders, as well as those of their allies, outside the ICC jurisdiction (the current example being Syria).

The rainbow of expectations in international criminal justice thus ranges from (i) a national jurisdiction to (ii) ICC jurisdiction on alleged crimes in a State Party or by its nationals, further to (iii) ICC jurisdiction established retroactively in a non-State Party, to (iv) the establishment of an ad hoc tribunal, and finally, at the other end, to (v) total impunity for 'the most serious crimes of concern to the international community as a whole'.[83] Even if we may wish to see as 'one of the most valuable effects of international criminal law…its contribution to the creation of a sense of a cosmopolitan identity, an identity which values all human beings equally, independent of their national or other ties',[84] the status of international criminal justice today rather confirms striking inequalities—of both victims and suspects—that define international legal space.

An additional challenge to the predictability of the ICC jurisdiction is presented by the crime of aggression. Following the Diplomatic Conference of Kampala in 2010, the ICC may one day be tasked to exercise jurisdiction over the crime of aggression. The revisions adopted in Kampala introduce complex rules on the entry into force and application of the jurisdiction for the crime of aggression and thereby accentuate the tailor-made character of ICC's jurisdiction.[85] The individual criminal responsibility for the crime of aggression in international law, first expressions of which formed the basis of the Finnish trial and so many others after WWII, now becomes subject to consent-based treaty law mechanisms, including opt-out, in the revised ICC Statute.[86] Furthermore, for aggression, the exercise of national jurisdiction in compliance with the complementarity principle presents supplementary challenges.[87]

The challenges of predictability and clarity of individual criminal responsibility, derived from the legality principle, as well as the expectation of equal treatment, consistency and coherence might suggest that the ICC era in some respects remains close to the previous era of ad hoc jurisdictions, established in the aftermath of the acts allegedly committed, as in Finland. Even in the ICC era, the determination of the existence and the exercise of jurisdiction—national, international or nothing—often takes place retroactively, and the applicable law follows from this choice. The ICC, as its predecessors, is not necessarily able to address the chronology of causalities of a larger conflict, nor does it always manage to address all sides.

[83] Rome Statute, see above n 78, preamble.

[84] David S. Koller, 'The Faith of the International Criminal Lawyer' (2008) *40 International Law and Politics*, 1019, 1023.

[85] On the entry into force of the revisions, see, eg, Claus Kress and Leonie von Holzendorff, 'The Kampala Compromise on the Crime of Aggression' (2010) *8 Journal of International Criminal Justice*, 1179.

[86] Even States Parties can declare their opt-out from the jurisdiction for aggression 'prior to the ratification or acceptance', Review Conference, RC/Res. 6, preamble operative para 1; Article 15bis (4).

[87] As demonstrated, for example, by the fifth Understanding adopted at Kampala: 'It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State,' RC/Res. 6, Annex III Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression.

From Articles 17 and 20 of the ICC Statute (discussed above), we can derive independence, impartiality and integrity as criteria that define whether national justice is deemed 'sufficient'.[88] If the ICC, other international tribunals and national courts are understood to act together with the goal of ending impunity, it is all of them together that face quality requirements that we could understand as preconditions for the presumed positive outcomes of criminal justice. How much independence, impartiality and integrity, then, can today be expected of national jurisdictions, acting in the aftermath of war (as in the Finnish trial), or other major crisis, such as a wave of large-scale terrorism?[89] How far can national trials based on an international obligation be detached from their cultural roots, public expectations and power-relations? Had the Finnish war responsibility trial been conducted by the Allied Powers directly, by a hybrid tribunal or an international one, what would be different?

Having come this far in our story, we start to acknowledge that the efforts undertaken earlier to examine the Finnish trial in the light of the different conceptions of positive effects to be gained by criminal justice seemed disturbingly artificial. Of course we knew the consequential theories could not really match, of course we knew those WWII trials were held for so many other reasons and served other purposes that we cannot address within the criminal law discourse only. The trials for wars of aggression, in particular, helped to mark the changes of power and of the identities of suitable allies, by explicitly condemning the acts of the previous leaders and making them bear the responsibility for the lost wars and the decline of the states. Individual criminal responsibility contributed to a speedy change of decor in the public scene: transforming powerful leaders into criminal convicts symbolized both the victory of the Allied and a new start in a new direction for many states, including Finland. By performing a series of familiar acts (criminal procedure), in a familiar forum of public power (criminal court), the trials amalgamated the lived and imagined worlds, and emphasized the power of the new normative system behind the trials. Seen from this perspective, the trial in Finland was a tiny link in a chain of public rituals of reorientation after WWII. We can question the technicalities of the trial, argue on many issues, but we cannot deny that there was this one function it completed with efficacy.

[88] There is a wealth of commentaries on the application of complementarity. For the argument that it suffices exclusively to compare the (actual or likely) sentences, see Kevin Jon Heller, 'A Sentence-based Theory of Complementarity', (2012) *53 Harvard International Law Journal*, 202–49.

[89] See Frédéric Mégret's analysis on the presumed 'vertical' essence of international criminal justice, as compared to the 'horizontal' of domestic criminal justice, 'In Search of the "Vertical": An Exploration of What Makes International Criminal Tribunals Different (And Why)' (October 9, 2008). Available at SSRN: <http://ssrn.com/abstract=1281546> (accessed 21 May 2013) or <http://dx.doi.org/10.2139/ssrn.128154>. On the presumed benevolence of the vertical, see Mégret, 41–2.

(III) Concluding Remarks: Never-ending Stories?

So much time has passed since the end of the war that we must, if only for the sake of our own mental state, take into an honest examination also this issue which at its time dramatically affected the Finnish public opinion. We have to get so close to this sensitive issue that it stops bothering our movements as a chip of stone in the sock.[90]

Is there a lesson to the Finnish trial story? We might see it as an example of how difficult the national exercise of jurisdiction based on an international obligation can be. It reminds us of how limited and contingent the instrument of criminal justice, intended for determining individual criminal responsibility in particular cases, may prove in elucidating historical contexts or addressing collective loss. We may also observe how far-reaching and powerful effects criminal trials may have, at many levels and in many directions. We are reminded of how they may awaken strong emotional and societal reactions, even in a context that could, in comparison, seem relatively successful or at least harmless in the eyes of the outside world.

International criminal justice is far more entrenched today than in 1945–6, in many important respects. No matter the lists of ratifications, the concept of international crimes and individual responsibility for them can no longer be ignored. Nevertheless, the International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda, and other ad hoc or hybrid tribunals have faced and continue to struggle with comparable dilemmas in a variety of contexts. Even the permanent ICC, due to the inherent fragility of its jurisdiction, acts at times in conditions resembling those of an ad hoc tribunal: competent on a retroactively determined slice of time and space, with strong expectations of prosecutorial discretion. Regardless of the way its jurisdiction is launched, the ICC is in its daily work obliged to manoeuvre between parties and take sides in a critical manner, as the examples of ongoing cases suggest.[91]

The perceived legitimacy and credibility of international criminal justice are thus constantly questioned. A highly publicized criminal trial is a powerful instrument for stating or affirming beliefs and directions, of establishing identities of good and bad, inclusion and exclusion. To call it a ritual is not to degrade it. It is rather to emphasize its full potential. Rituals are difficult to master, however. They may seem to work in one direction on the surface level, but also create adverse effects. A deficient trial may by its trauma engender taboos and martyrs. It may endanger open analysis of acts and responsibilities, thereby cementing a period in

[90] President Urho Kekkonen, minister of justice at the time of the war responsibility trial, in a speech at the Finlandia Hall in 1977, quoted in Lehtinen and Rautakallio, above n 27, 5.

[91] See Sarah Nouwen and Wouter Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) *European Journal of International Law*, 941; see also Sarah Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge University Press, 2013, forthcoming); Chacha Murungu and Japhet Biegon (eds), *Prosecuting International Crimes in Africa* (Pretoria: Pretoria University Law Press, 2011).

history under its protective cover. In a bedtime story turning into a nightmare, a trial becomes a damaged nuclear reactor that maintains its toxicity for interminable periods, slowly leaking emissions into its environment. But are those periods interminable, after all? Perhaps the current and future generations of Finland will soon be far enough from the wars. Perhaps the virtues of peace and democratic government were advanced by the trial, in one way or another. Perhaps in Sudan or Libya this will happen even sooner. We *know* that bedtime stories with happy endings exist.

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